Markets in the making

STATE OF PLAY

PABLO ZAPATERO

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Markets in the Making. State of Play

Pablo Zapatero

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A mi padre,
al que tanto quiero y admiro

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Tlf. (+34) 91 544 28 46
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Regulating world exchange

1. Deeper interdependence

Exchange is part of our social nature and thus critical for our species; as humans, we produce and exchange ideas, things and tasks, and by doing so, all involved are better off. In short, the collective cumulative innovation that gives shape to the progress of mankind is based on all forms of exchange. From gift-giving and barter to trade, from the time of our primitive ancestors, exchange has taken place, to the benefit of all. We can only guess when primitive forms of trade became the dominant social norm. Barter among peoples is as old as human history. For millennia, we traded to improve our lives. By trading we can specialize and divide labor, and thus access an endless variety of goods (read things) and services (read activities) that we could never dream of producing by ourselves.[1] In some way, these are part of the infrastructure of our species. The origins of community are based on and shaped by exchange, and thus patterns of specialization and division of labor. Those patterns have made it possible to access the wide variety of goods, services and technologies that characterize advanced societies.

Take the mobile phone, to pick a pervasive example. In essence, we cannot manufacture it at home, nor organize a global telecom network on our own. We need to enter into multiple transactions with private and public actors and therefore complex economies of scale in order to have affordable access to such technological devices (the good) and the related communication infrastructures (the services) allowing us to communicate with other people in any place, at any time, under price-cutting competition, almost everywhere on earth. The legal infrastructures of world exchange –and thus world trade law and institutions– allow us all to benefit from the specialization, division of labor and comparative advantages of the many-many others around the

1 L. Read, I, Pencil, *My Family Tree As Told to Leonard Read* (2010).

world, contributing to the production and distribution of a wide variety of components associated with those goods as well as the tasks associated with those services; certainly, this global fragmentation of production and distribution also applies, in one way or another, to many of the things and activities that currently surround most of us.

In short, trade is good for all. The driving force behind trade lies deep in the human collective experience. Trade and commerce are among the oldest human activities, serving as engines for wealth, innovation and change.[2] To paraphrase Wonnacot, today, trade continues to serve the function of communication, for we can imagine how much poorer we would be in an informational sense if, by decree, our borders were to be closed to the exchange of foreign goods and services.[3] The development of commercial trade based on market principles from earlier forms of exchange, such as gift-giving or barter, was a long-term cumulative process. Appearing in archeological records, premodern patterns of trade have their origins in the exchange of seashells and obsidian, proving signs of trade in the form of seashell necklaces as far as 100 miles from the sea: from its beginnings in the prehistoric period to the emergence of the great trade networks linking Afro–Eurasia in the first millennium CE, the organization of long-distance trade, starting to take form in the early river valley societies that developed along the Tigris–Euphrates, Nile, and Indus, has shaped the evolution of mankind.[4] The profit-seeking system of markets based on prices was not firmly established until the industrial revolution of the 18th and 19th centuries CE; however, the presence of some of these economic patterns in pre-modern trade should not be underestimated, as evidences of markets in which prices were set by supply and demand appear between the late-fourth and mid-third millennium BCE. In any case, whether the modern capitalist system can be traced to around the 16th century, as some scholars maintain, or can be seen as having developed progressively since the fourth millennium BCE, as others claim, the fact is that long-distance trade has had a pervasive influence on the ancient human adventure. Indeed, we have come a long way since the premodern exchange

2 For a notable narrative history of world trade see W. Bernstein, *A Splendid Exchange: How Trade Has Shaped the World* (Atlantic, 2008).

3 G. Winham, *The Evolution of International Trade Agreements* (University of Toronto Press 1992) at 5.

4 See R. Smith, *Premodern trade in world history* (Routledge 2009).

of seashells and the post-modern private megaport infrastructures with MalaccaMax containerships crossing the oceans to keep the so-called global factory functioning.[5]

Today, trade in goods and services is managed through increasingly complex and efficient supply chains, giving new shape to the traditional forms of trade; somehow, global supply chains have become the world economy's backbone and central nervous system, as industrial production processes are increasingly fragmented around the globe.[6] Nowadays, the fragmentation of manufacturing and the greater role of trade in industrial products that are further used in the production process (so-called trade in intermediates or trade in tasks) is changing the nature of production, and consequently the millennia-old landscape of long-distance trade. As a result, the world-scale production and distribution of goods and services can be fairly portrayed as one of the most powerful drivers for deep integration.[7] In today's global factory, the capacity to produce and distribute goods and services is dispersed through an expanding network of peripheral and core societies alike, regularly spanning many countries, with each performing tasks in which there is a cost advantage. In short, the two-way trade in manufactures within single industries (so-called intra-industry trade) is a sign of our times,[8] as multiple

5 For the global transformations produced by the evolution of standardized container shipping see F. Broeze, *The Globalisation of the Oceans: Containerisation from the 1950s to the Present* (St Johns 2002). For a general account of the impact of the box see M. Levinson, *The box: how the shipping container made the world smaller and the world economy bigger* (Princeton University Press 2006). For the early visions on the potential benefits and efficiency of containerization see R. King, G Adams, & G. LLoyd Wilson, 'The Freight Container as a Contribution to Efficiency in Transportation', 1 *Annals of the American Academy of Political and Social Science* 87 (1936) : 27–36.

6 See i.e., G. Gereffi, 'The Organization of Buyer-Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks'. *Commodity Chains and Global Capitalism* (Greenwood Press 1994), at 95-122 and G. Gereffi, J. Humphrey & T. Sturgeon, 'The Governance of Global Value Chains', 12 *Review of International Political Economy* 1 (2005): 78–104.

7 P. Lamy, 'The new mapping of international trade', *WTO | Speeches and statements* (27 February 2013).

8 K. Sanyal, & R. Jones, 'The theory of trade in middle products', 72 *American Economic Review* (1982): 16–31, R. Lanz, S. Miroudot & A. Ragoussis, 'Trade in intermediate goods and services', *OECD Trade Policy Working Paper No. 93* (OECD 2009) and R. Johnson & G. Noguera, 'Accounting for intermediates: Production sharing and trade in value added',

stages of production are disaggregated across national boundaries, through organizational structures of densely networked companies.[9]

Not surprisingly, the size and magnitude of outsourcing, off shoring and intra-firm trade today is simply unprecedented; high among the reasons for this phenomenon connected with supply chains is the intensification of technological progress: nowadays, manufacturers and retailers are able to manage complex international production networks that cover vast geographical distances as a result of quantum leaps in transportation and communications technology.[10] In short, in recent decades, technological progress has significantly reduced the costs and complications associated with long-distance trade.[11] Fuelled by key advancements such as containerization and IT, world trade has led to the emergence of a global manufacturing system in which the production capacity of companies can be globally dispersed: with improved logistics and infrastructures for accommodating outsourcing and off shoring, supply chains now span more and more countries, with the concomitant result that nations are specializing in different branches of manufacturing and even stages of production within globally atomized industries.

Technically speaking, supply chains are a dynamic method of organizing production internationally, involving the unbundling of stages of production across different countries based on cost advantages. Indeed, the globalization of supply chains has been around for almost as long as modern trade itself; however, what is different is both its qualitative and qualitative impact, due to the intense fragmentation of global production networks. In this regard, trade in intermediate goods now comprises close to 60 per cent of total trade in goods, being the average import content of exports around 40 per cent.[12] In fact, the buoyancy of a country's exports and its integration in global supply chains through imports of intermediates has a strong positive correlation; with increasingly complex supply chains in place, many production steps are

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86 *Journal of International Economics* (2012): 224–236.

9 G. Gereffi & M. Korzeniewicz, *Commodity chains and global capitalism* (Praeger 1994).

10 On changing production costs and geographical shifts in world production see in particular P. Krugman, 'Increasing Returns and Economic Geography,' 99 *Journal of Political Economy* 3 (1991): 483–499.

11 For a more general reflection see F. Cairncross, *The death of distance: how the communications revolution is changing our lives* (Harvard Business School Press 2001).

12 WTO, *International Trade Statistics 2009* (WTO 2009) at 2.

carried out across different countries, with semi-finished products or parts travelling along the production chain between these countries before leading to goods and services for final consumption. Under the exponential increase of trade in intermediates, components are produced and assembled in different countries; in other words, production is multi-located.

Trade is thus no longer just about exports. As a direct result of these patterns, the high level of import intensity in export production has created an unprecedented level of inter-dependency among countries engaged: in order to export, countries have to import. A wide variety of products ranging from machinery, robotics, electronics, vessels, aircraft, automobiles to clothing, or even food, to name some, are increasingly made across borders. Fewer and fewer products are actually 'made in' one place; as the world itself currently operates as a formidable global factory. Under multi-located production of goods, concepts such as 'Made in', 'country of origin' (thus read also rules of origin) are basically becoming obsolete. As Lamy explains, today's goods and services are increasingly 'Made in the World'.[13]

In this context, production is also more intensely connected to services than we tend to think. In this regard, as exports and imports are increasingly interconnected, trade in services and trade in goods also follows the pattern. Today, a large share of the total domestic content of exports worldwide is generated by manufactured exports originates in the services sector. In fact, the share of services in world trade doubles when trade is measured in value-added, as the provision of industrial or commercial services is increasingly subcontracted across countries, and thus comprises an ever growing component in the value of final products.[14] Contrary to most conventional assumptions, in fact, some of these services are no longer purely operational, as they also increasingly deal with the strategic value of firms. In this regard, conventional wisdom suggests that companies should never offshore their core competencies or those processes that deliver strategic value to the firm. Nonetheless, despite the fact that value hardly gets any more strategic than

13 P. Lamy, *The mapping*, op.cit.

14 For the different business models or trajectories that can develop in the outsourcing and offshore services industry see, in particular, M. Sako, *Outsourcing and Offshoring: Key Trends and Issues,* Background Paper prepared for the Emerging Markets Forum (Oxford Said Business School 2005).

R&D itself, even these critical processes are relocated by off shoring R&D to foreign service providers.

Basically, supply chains have been intensely fueled by technological innovation, in one way or another. Probably the rise of containerization combined with the intensive use of IT and logistics has implemented the greatest changes in the economic geography of world production over the last four decades. In this regard, container shipping technology combined with IT has fueled trade in intermediates by significantly reducing freight costs and transit time. Before the 1970s, manufacturers needed to hold large stocks of components, as freight transportation was too unpredictable to risk that supplies from far off locations in the world would arrive on time to keep production lines functioning. However, with the advent of containerization in late 1970s, time transit as well as time spent in cargo exchange from one carrier to other began to significantly decrease. As trade in parts and components is the most time-sensitive trade flow in global supply chains, time acts in practice as a trade barrier.[15] By sidestepping long delays at docks and time-consuming and expensive interchanges between land, sea and air carriers, the race for pervasive world off shoring and outsourcing under free trade rules was inaugurated. Today, moving products around the globe is not only fast and easy but cheap, as freight costs have plummeted. As a logical consequence, information systems and logistics tasks associated with fragmented production have become for many companies almost a routine operational function (scheduling production, storage, transportation, and delivery) in which off shoring and outsourcing parts and components is a given in the business landscape.

The fascinating history of the box and its standardization is well documented.[16] Nowadays, most of the metal boxes moving around the world hold industrial products, as world trade is no longer dominated by essential raw materials or finished products. Manufacturers are routinely contracting with other companies the supply as well as just-in-time transportation services, to assure arrival of inputs exactly when needed. By taking wage rates, taxes, subsidies, energy costs, and tariffs into account under tight cost-effective analysis, along with considerations of freight costs and transit times, these compa-

15 Hummels, David L., & Georg Schaur. 'Time as a Trade Barrier', 103 *American Economic Review* (2013): 2935–59.

16 M. Levinson, *The box,* op.cit.

nies decide to import each component of their production line, or each retail product, from a variety of foreign supplies located elsewhere in the world.

The buoyant economies of scale in production networks are illustrated by deep ongoing changes in transportation infrastructures, such as the steady expansion of containerization, the growing size of the box (from original 22-foot to 44, and even 53-foot), the regular increase of the TEU capacity of the world's fleet of containerships (with naval architects currently taking the measures of straits as part of their construction standards: e.g. MalaccaMax, PanamaMax, etc) as well as highly competitive mega-container ports offering efficient just-in-time services, access to large vessels and flows of cargo, and direct sailings to other transport hubs and nodes around the world. The importance of these transportation infrastructures, servicing supply chains by steadily reducing shipping costs and transit times, cannot be underestimated. These industrial transport complexes and facilities are, in practice, the physical infrastructures of globalization, pushing forward deep economic integration through trade.

Big technological transformations always readjust paradigms. Inevitably, increasing trade in intermediate products, coupled with decreasing transport costs, and greater fragmentation of production require to change the conventional narrative on trade, as well as traditional trade policies. In this sense, the realities of the disaggregated global factory suggest fine-tuning policy angles, as conventional statistics still give misleading perspectives of the relevance of trade to economic growth and income in all countries.[17] There are strong reasons in this regard. To begin with, when trade comparative advantages apply to tasks rather than final products, the skill composition of labor embedded in the domestic content of exports defines the development level of participating countries: for example, we know that labor-intensive assembly is regularly transferred to low-wage countries, thus reducing low-skill manufacturing employment in industrialized countries. However, the big picture is more complex and subtle, as industrialized countries also have a short and midterm comparative advantage to perform high-skill tasks which logically, capture a larger share of the total value added, which happens to be better paid than assembling components.

17 See A. Maurer & C. Degain, 'Globalization and trade flows: what you see is not what you get!', *WTO Staff Working Paper ERSD* 2010-12 (WTO 2010).

To select a well-documented case study, traditional statistics suggest that the Peoples Republic of China has a comparative advantage in producing Apple's electronic products;[18] but using value-added measurement, that comparative advantage within global supply chains is still basically in assembly work. In this case, and many others, 'Made in China' basically means 'Assembled in China'. However, what makes up the commercial value of Apple's cosmopolitan products comes from the countries that preceded assembly, from design to the manufacture of components as well as the organization of logistics for the efficiency of that supply chain. Basically, as exported goods within world production networks may require significant intermediate inputs from manufacturers, who in turn require significant intermediate imports, much of the revenue (or value-added) from selling those exported goods may end up abroad. This fact is particularly quite instructive of the need to find new ways to approach and conduct trade policies.

Traditionally, we have looked at trade flows of goods and services across borders with quite simplified assumptions. However, as bilateral trade balances are often measured in gross terms, the trade deficits with final goods producers (or the surplus of exporters of final products) are exaggerated, as these do not deduct the value of foreign inputs. Paradoxically, statistics currently attribute the full commercial value of imports to the last link in the production chain, even where the contribution made by that final link has been minimal. Needless to say that, with so much trade now involving foreign companies operating within national borders, and with components often criss-crossing those borders several times, this method attributing the full commercial value to the last country of origin results in a significant measurement bias. The issue is not merely a simple curiosity as the former WTO DG has noted, statistical biases pervert the true economic dimension of bilateral trade imbalances, leading to misguided perceptions and counter-productive policy decisions.[19]

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18 See J. Dedrick, K. Kraemer & G. Linden, 'Who profits from innovation in global value chains?: a study of the iPod and notebook PCs', 19 *Industrial and Corporate Change* 1 (2010): 81–116, Y. Xing & N. Detert. 'How the iPhone widens the United States trade deficit with the People's Republic of China', *ADBI Working Paper Series No. 257* (2010) and G. Linden, K. Kraemer & J. Dedrick, 'Who captures value in a global innovation network? The case of Apple's iPod', 52 *Communications of the ACM* 3 ((2009): 140–144.

19 See P. Lamy, 'Made in China tells us little about global trade', *Financial Times* (24 January 2011).

A few key lessons for policymakers are clear: trade barriers (whether at the border or behind borders) often disrupt entire global supply chains, as components travel into one country and out of another to finally form the finished product.[20] Nowadays, the interconnectedness of economies through complex production networks suggests more cooperative and less mercantilist approaches to traditional domestic trade policies as well as to multilateral, regional and bilateral trade negotiations. In this regard, world production networks provide a meaningful measure and sense of the significant importance of trade openness to growth, employment and innovation. However, public representatives still lack the perspective and tools enabling them to fully appreciate the extent of the changes under way, and thus enable them to more reasonably readjust their negotiating positions in current trade negotiations.

The pervasiveness of supply chains in world trade would suggest revisiting the manner in which we compute trade flows, how we calculate jobs associated with trade or bilateral trade balances; and in consequence also how we conduct trade policy. In short, in order to make the most of the resulting growth, diversification, employment and developmental opportunities, it is essential to look at and go beyond conventional trade policies. As mentioned, export-oriented low-skill assembly jobs have a value which is comparatively distinct from other export activities which are intensive in medium and high skill labor; in a world of trade in intermediates within fragmented production processes, we need to get specific, and look at the domestic value added or domestic content of exports, in order to get the measures right, and adopt informed policy decisions. However, the challenge also requires improving the quality of statistics to develop ways of allocating imports to users (industries) across nations. On this particular issue, more detailed bilateral trade in intermediate goods and services is a priority.[21]

Along the lines of this policy, a joint initiative by the WTO and the OECD together with national statistics offices recently released a first public database

20 See *Trade Patterns and Global Value Chains in East Asia: From trade in goods to trade in tasks* (WTO-OECD-JETRO 2011).

21 See R. Koopman, Z. Wang & S. Wei, 'How much Chinese exports is really made in China –Assessing foreign and domestic value-added in gross exports', *NBER Working Paper No. 14109* (2008) and also R. Koopman, W. Powers, Z. Wang & S. Wei, 'Give credit to where credit is due: tracing value added in global production chains', *NBER Working Papers Series 16426* (2011).

of world trade measured in value-added, aiming at the future elaboration of truly global input-output tables.[22] Undoubtedly, these efforts to disclose the domestic content of exports (domestic value-added) are an excellent step in the right direction. However, they are still insufficient when it comes to avoiding ill-informed policymaking. As explained, today, the fragmentation of production processes often involves fragmentation within multinational enterprises across increasingly complex business networks; thus, measuring the flows of value-added only reflects part of the picture of the impact of world trade in creating, distributing and redistributing wealth. The reason is clear and simple: to give just one paradigmatic example, a significant part of the value-added is often repatriated through transfer from the affiliate to the parent company (recorded as profit repatriation), or may reflect inter-corporate or intra-corporate payments for using IP assets, all of which is not currently recognized as 'domestically produced assets' in conventional national accounts. Therefore, even the new estimates of value-added would not provide the full picture of where the revenue ends up at the end of the world production line. New statistics in this direction would contribute not only to informing efficient trade policies but would lead to more coherent policymaking in multiple trade-related areas as well and, in particular, those associated with investment, technology and IP, including those regarding the taxation of intangibles (read IP). Only by doing so, is it possible to have the big picture of the reforms required to redistribute bigger pieces of the cake, including world revenue from intangibles (i.e. TRIPS) for example, through the legal and regulatory nodes of economic interdependence.

2. Infrastructures of open trade

The pressing requirements of increased and improved empirical knowledge follow the long path of some wealth-enhancing economic theories and policies. Long before Ricardo conventionally framed the virtues of trade in modern terms, by devising the theory of comparative advantage,[23] many entrepreneurs

22 See *OECD-WTO Trade in Value Added* | TiVA (May 2013) and *Implications of global value chains for trade, investment, development and jobs,* G20 Report, (OECD–WTO–UNCTAD, 6 August 2013).

23 D. Ricardo, *The Principles of Political Economy and Taxation* (London, 1821, reprint, New York, 1965), pp.77–97.

over time and across space naturally and spontaneously practiced specialization, division of labor and exchange. However, trade only began to be considered a public good a few centuries ago. In this regard, neither autarkic nor open trade policies are inherent to states. Thus, the mercantilist policies from the 18th century basically focused on the balance of trade, emphasizing export promotion, and placing import restraints above the level of exports. The first social reactions against such policies took shape later on, when economists and businessmen in England voiced their opposition to prohibitive customs duties, and urged the negotiation of trade agreements. These liberal ideas on trade led to the signing of a series of treaties, among them the Anglo-French Treaty of 1786, ending an economic war, as well as the Cobden-Chevalier Treaty of 1860,[24] which cut duties for a wide variety of products,[25] and to some extent operated as a template for other European trade pacts.[26]

However, the open trade policies of the second half of the 19th century, significantly led by the English,[27] were only to mitigate mercantilist policies for a few decades. The unilateral free trade that had begun with Prime Minister Robert Peel's moving away from mercantilism, by repealing the Corn Laws in 1846, was certainly a highly remarkable feat. In fact, the British embrace of unilateral free trade at that time was to remain basically unchanged until the 30s of last century, surviving both protectionism and trade bilateralism, and even facing the emergence of Germany and the US.[28] In any case, conti-

24 See A. Iliasu, 'The Cobden–Chevalier Commercial Treaty of 1860', 14 *The Historical Journal* (1971): 67–98

25 See P. Wonnacot (ed.) & M. Allais, 'International Trade', *Encyclopaedia Britannica* (24/01/2014),

26 In practice, the Cobden-Chevalier network contributed to the deepening and diversification of infra European trade but was ideologically more properly identified with reciprocal liberalization than to the free trade doctrine. See M. Lampe, 'Effects of Bilateralism and the MFN Clause on International Trade: Evidence for the Cobden–Chevalier Network, 1860–1875', 69 *The Journal of Economic History* (2009): 1012–1040.

27 On the fascinating and puzzling history of Britain's unprecedented unilateral repeal of the protectionist Corn Laws in 1846 see, in particular, C. Schonhardt-Bailey, *From the Corn Laws to Free Trade: Interests, Ideas, and Institutions in Historical Perspective* (MIT Press 2006).

28 See *Commercial Policy in the Interwar Period: International Proposals and National Policies* (League of Nations 1942) and Ch. Kindleberger, 'Commercial Policy between the Wars', *The Cambridge Economic History of Europe*, Volume 8 (Cambridge University Press 1989), chapter 11, section 3 in particular.

nental European countries entered into a period of protectionism at the depression starting in the 1870s that largely did not turn around until the end of the Second World War. To put things in context, however, it is interesting to recall that between 1815 and 1914, according to historians, volumes of exports multiplied approximately forty-fold in Europe, whereas during the 18th century they had trebled at the most.[29] Nonetheless, from the early decades of the 20th century, political and economic nationalism as well as the Great War (1914-1918) exacerbated protectionist policies without respite until the end of the Second World War. Liberal trade ideas got briefly on board once in the inter-war period, with the first multilateral attempt to improve trade cooperation in 1923, when more than 30 nations concluded an international conference for the unification of customs formalities, paving the way for the convention for the abolition of import and export prohibition and restriction, signed at the world economic conference of 1927, in Geneva (2-23 May 1927).

However, the resurgence of economic nationalism after the Great War was to refuel protectionist policies through to the crash of 1929 and until the end of the Second World War.[30] In this context, and particularly following the passage of the infamous Smoot-Hawley Tariff in 1930, countries literally entered into a race to raise trade barriers without constraint, declining trade flows and investments, promoting increasing confrontation and thus inaugurating a new term for the occasion: beggar-my-neighbor policies.[31] From there, open trade would have to wait to the end of the Second World War to gain policy space and momentum, under the leadership of the Roosevelt administration. As Drahos and Braithwaite frame it, the impact of the beggar-my-neighbor policies between the late 19th century and mid 20th century was so severe that the commitment to WTO still seems historically resilient today in its caging of 'the tiger of mercantilism'.[32]

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29 For an analysis of European trade policy in the nineteen century, when the flourishing of liberalism in international trade theories and the development of modern protectionism see P, Bairoch, 'European Trade Policy, 1815–1914', *The Cambridge Economic History of Europe–The Industrial Economies: The Development of Economic and Social Policies*, (Cambridge University Press 1989) at 1-160.

30 See G. Winham, *International Trade,* op.cit.p.26-27.

31 For the classical (and still contemporaneous) account of the inter-war years see K. Polanyi, *The Great transformation: the political and economic origins of our time* (Rinehart 1944).

32 See J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge University Press 2000) at 206.

Nevertheless, the case for free trade was not initially and exclusively argued for economic reasons but to also contribute to peace and stability as well.[33] Certainly, trade has not only begun to be considered a peace-keeping policy tool in recent decades.[34] The case for nondiscriminatory trade today is not dissimilar from those earlier explanations, as it not only generally underlines the importance of reducing inefficient allocation of resources produced by protectionism but also that predictability and stability for business transactions to proceed.[35] However, policy measures in this direction would only reach a multilateral treaty making after two world wars, by convening the United Nations Conference on Trade and Employment (1947-1948) of which the General Agreement of Trade and Tariffs (GATT) is a long-standing enormous contribution. The first steps to erect the current world trading system began at that UN conference which aimed to take trade back to work or, in other words, to mitigate the damage brought about by autarkic policies.[36] Taking the lessons of the 30s seriously, the architects of the postwar international order set up the incipient legal infrastructures to increase economic cooperation and integration, in order to avoid repeating the dire experiences of the beggar-my-neighbor policies from the inter-war period. As Ruggie explains, their task was to design a treaty-based regime that would safeguard and even aid the quest for domestic stability without triggering the mutually destructive consequences of that period.[37] However, the international organization that the UN Conference on Trade and Employment was destined to create never saw the light of day in its original form –as the International Trade Organization (ITO) – because the US government was unable to pass its Charter, known as the Havana Charter, through a reluctant US Congress, and it was finally withdrawn by the Truman administration, after the 1950

33 See generally F. Trentmann, *Free trade Nation: The forgotten virtues of free trade* (Oxford University Press 2008).

34 *World Trade and the Doha Round, Final Report of the High-Level Trade Experts Group (May 2011) at 2-3, paragraph 12.*

35 G. Winham, *International Trade,* op.cit.p.129.

36 For a well-documented official exploration of such adventure see C. VanGrasstek, *The History and Future of the World Trade Organization* (WTO 2013).

37 See J. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982): 379–415 and J. Ruggie, 'Embedded Liberalism Revisited: institutions and progress in international economic relations', *Progress in international relations* (University of California 1991) at 201–234.

election.[38] Reasonably, at this critical historical juncture after the war, other signatories did not have enough confidence to go forward without US backing.[39]

However, in the meetings of that Conference, an unadverted critical step was taken: by the time the trade delegates had returned to their countries, a small global network of public representatives and officials in favor of open trade had been created, with long-lasting positive consequences.[40] With the uncertain ratification of the ITO charter pending, this new breed of trade diplomats –mostly veteran trade policy officials– managed to strategically negotiate a new agreement for the progressive elimination of trade tariffs and quotas by directly and extensively borrowing from chapter IV ('Commercial Policy') of the Havana Charter: the GATT. With a few exceptions, the drafters of the GATT were the very same people who had negotiated the ITO Charter. In fact, the two sets of meetings at which the GATT text was negotiated –in Lake Success, New York, in early 1947 and in Geneva in the late summer of 1947– were extensions of ITO preparatory Committee meetings, serviced by the same delegations and chairmanship.[41] In essence, the final text of the GATT of 1947 equated nondiscriminatory trade (or so-called MFN-based trade) with a public good and reinforced the policy prescription, not without a generous amount of small print. The fine piece of clockwork legal technology that resulted would inaugurate the post-war international order for non-planned economies, and would soon expand its coverage through a series of multilateral trade negotiations (MTN), giving birth to the world trading system and its long quest for trade liberalization.

The ultimate decisions regarding the Geneva round were made by national

38 On the failure of the ITO see, in particular, C. Wilcox, *A Charter for world trade* (Macmillan 1949), W. Diebold, *'The End of the ITO',* 16 *Essays in International Finance* (1952) and T. Zeiler, *Free Trade, Free World: The Advent of GATT* (University of North Carolina Press 1999).

39 See S. Dryden, *Trade Warriors: USTR and the American crusade for Free Trade* (Oxford University Press 1995) at 24-31 and T. Zeiter, *Free Trade, Free World*, op.cit. pp.147–164.

40 See P. Haas 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organization* 1 (1992): 1–36.

41 R. Hudec. 'The GATT legal system: a diplomat's jurisprudence', 4 *Journal of World Trade Law* (1970): 631.

security officials, not free-trade experts, as national security forced a 'conciliatory approach', particularly in Anglo-American trade relationships (i.e. British Imperial preferences).[42] Paradoxically, however, the impact of cold war on the development and workings of GATT is not commonly considered in most of histories of GATT, and neither on historical accounts of the cold war itself:[43] however, as McKenzie has explained, GATT did not obviously function in isolation from the Cold War, as liberal trade and increased prosperity were seen as ways to protect capitalist democracies against communist encroachment.[44] To paraphrase this historian, the Cold War was a midwife at the birth of the GATT.[45] In any case, the fact that national security played a key role in current accounts of GATT history does not challenge the importance of those original GATT insiders –and particularly those who had been at Havana negotiations– for the construction of a viable regime for trade liberalization. In fact, it is the personal bonds forged in the Havana negotiations that laid down the basis of the long-term policy venture that would progressively transform the GATT rules into something different from the type of trade agreements that had been around for decades: a creative and sophisticated dynamic treaty-based regime for the reduction of tariffs and non-tariff barriers.[46]

Decades later, the original efforts of this remarkable group of trade delegates would culminate with the final inception of the WTO, emerging in 1994 from the eighth (and most ambitious) of a series of multilateral trade rounds pursued within the GATT, and thus making the circle round 47 years later. The social transformations in economic growth, income and employment that have been produced in recent decades resulting from the functioning of this legal and institutional infrastructure of world exchange is probably incom-

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42 T. Zeiler, 'GATT Fifty Years Ago: US Trade Policy and Imperial Preferences,' *Business and Economic History* 26 (1997): 714.

43 For notable exceptions see, in particular, L. Haus, *Globalizing the GATT: The Soviet Union's Successor States, Eastern Europe and the International Trading System* (Brookings Institution 1992), T. Zeiler, *Free Trade, Free World,* op.cit. and, more recently, F. McKenzie, 'GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947–1959', 10 *Journal of Cold War Studies* (2008): 78–109.

44 F. McKenzie, 'GATT and the Cold War, op.cit.p.79.

45 F. McKenzie, 'GATT and the Cold War, op.cit.p.81 and 86.

46 See A. Chayes & A. Handler Chayes, *The new sovereignty: Compliance with international regulatory agreements* (Harvard University Press 1995) at 279.

mensurable. In any case, and using standard figures, the GATT/WTO regime has paved the way for the most rapid and sustained economic expansion in history, with estimates reaching $18.3 trillion of dollar value of merchandise exports, and $4.3 trillion in services exports.[47] In short, the GATT/WTO regime has been the key institutional driver for the steady postwar erosion of trade barriers. Obviously, the formidable economies of scale unleashed, and the wide variety of affordable quality goods and services available in our societies today would have not reached the shores without this infrastructure.

Nowadays, the case for open trade is robust. As conventional economic literature suggests, trade encourages economies to allocate resources to where they can be most productively used. In addition, higher trade growth rates tend to reflect a link between prosperity and open trade.[48] In fact, as the high-level trade experts group appointed in 2010 by WTO to help overcome the Doha stalemate explains, for the last four decades of the 20th century, those developing countries that grew at 3% or greater annual growth had a commensurate increase in trade; by contrast, those that stagnated or declined also had atrophied links to the global economy.[49] With regard to OECD countries, on the other hand, a 10% increase in trade exposure (trade as a percentage of GDP) is associated with a 4% increase in labor productivity (output per working-age person); thus, as wages are linked to productivity growth, greater openness also implies rising standards of living.[50]

But more importantly, not only has trade been a key driver for economic growth but it has literally lifted hundreds of millions of people out of poverty in developing countries since the original inception of the world trading system;[51] trade reduces poverty on average and in the long run.[52] Last but not

47 See *International Trade Statistics 2013* (WTO 2013 WTO).

48 See generally, *World Trade and the Doha Round, Final Report of the High-Level Trade Experts Group* (May 2011), and pp.2-3, paragraph 10 as well as p. 14, paragraph 1.9 in particular.

49 See *World Trade and the Doha Round*, op.cit. at 2, paragraph 10.

50 See e.g. *The Sources of Gro wth in OECD Countries* (OECD 2003) and *Seizing the benefits of trade for employment and growth*, OECD– ILO–World Bank–WTO, , Final Report (11 November 2010).

51 See *World Trade and the Doha Round*, op.cit. at 14, paragraph 1.9.

52 Among the large body of empirical work on the topic see, in particular, A. Winters, N. McCulloch & A. McKay, 'Trade Liberalisation and Poverty' 42 *Journal of Economic Literature* 1 (2004): 72-115.

least, the efficient allocation of resources promoted by trade has to be included into the equation of increasing standards of living, as open trade renders goods cheaper, and more diverse and sophisticated than at any previous moment in history.[53]

In 1947, the economist Jacob Viner wrote the following lines: 'there are few free traders in the present-day world, no one pays attention to their views, and no person in authority anywhere advocates free trade'.[54] This adviser to the Department of State during post-war trade negotiations could not have dreamed how the GATT insider network would manage to evolve in such a context; at that time, the GATT was indeed not particularly promising, as it lacked a proper institutional structure and had to be applied provisionally for five decades, in order to avoid domestic ratification procedures, due to self-evident difficulties in passing the text through parliaments.[55] But in the curse of decades, this 'Cinderella' of the post-war world's international regimes –as its first executive secretary liked to portray GATT–[56] progressively transformed itself into a structural regulatory node for economic integration, and thus a solid institutional foundation for the global market economy in the making.[57]

Markets do not exist outside the state, and therefore outside society.[58] It is no accident that most if not all mainstream interpretations of the market economy paradigm have finally turned their gaze on the critical importance of rules and institutions in order for markets to function effectively.[59] In short,

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53 *World Trade and the Doha Round, Final Report of the High-Level Trade Experts Group* (May 2011) at 2-3, paragraph 11.

54 J.Viner, 'Conflicts of Principle in Drafting a Trade Charter', 25 *Foreign Affairs* (1947): 613.

55 R. Hudec. 'The GATT legal system, op.cit.p. 633.

56 W. White, *The Achievements of the GATT,* Address at the Graduate Institute of International Studies, Geneva, December 1956 (GATT 1957).

57 J. Jackson, *The World Trade Organization Constitution and jurisprudence* (RIIA 1998).

58 K. Polanyi, *The great transformation* (Rinehart 1944).

59 For neoinstitutional economics and the 'rediscovery' of institutions for markets to function properly see D. North, *Institutions, institutional change, and economic performance* (Cambridge University Press 1990) and O. Williamson, 'The new institutional economics: Taking stock, looking ahead' 38 *Journal of Economic Literature* (2000): 595-613.

regulation is what ensures that markets exist as well as function efficiently. In this regard, the law of the GATT/WTO regime and its Rounds has proved an essential tool for global open markets. By establishing a stable legal framework for managing non-discriminatory trade, the world trading system has lowered tariffs to almost negligible levels, and has successfully inhibited protectionist pressures as well. Notwithstanding the significance of most of GATT rounds, and particularly the Kennedy (1963-1967) and Tokyo Round (1973-1979),[60] the watershed for trade governance was the Uruguay Round (1986-1992) in which the agreement of the World Trade Organization (WTO) was established.

The WTO is probably the most successful treaty-based regime of the post-1945 period, and thus of the most recent history of universal international organizations. In a nutshell, its quasi-universal membership (160 WTO Members and counting) is bound by a series of common disciplines in several key areas such as (1) trade in goods, (2) trade in services and (3) IP protection, as well as (4) binding dispute settlement and (5) regular external monitoring of domestic trade policies. Last but not least, the WTO defines itself in its own foundational agreement as a permanent forum for progressive trade liberalization (read international lawmaking).[61] Significantly, this creative mechanism for the cooperative reduction of trade barriers has currently produced more than 30,000 pages of treaty law, including annexes and 'schedules of concessions'.[62]

There is nothing equivalent within other functional multilateral organizations. From a comparative international law perspective, the characteristics of this third generation's regime are groundbreaking not only in regulatory coverage but institutional terms: a 'single package' approach to most of its legal instruments, the exclusion of reservations, an automatic and binding

60 On pre-WTO MTNs see, in particular, E. Preeg, *Traders and Diplomats: An Analysis of the Kennedy Round under the General Agreement on Tariffs and Trade* (Brookings Institution 1970) and G. Winham, *International Trade and the Tokyo Round Negotiation* (Princeton University Press 1986).

61 See Article III.2 of the WTO Agreement.

62 On the transformative challenges for the administrative infrastructures of developing countries resulting from the move of the world trading system from border barriers to internal barriers see, in particular, J. Finger & P. Schuler, 'Implementation of Uruguay Round Commitments: The Development Challenge', 24 *World Economy* 4 (2000): 511–525.

jurisdiction for all Members –authorizing suspension of trade concessions– and a dynamic forum to advance rule-based progressive liberalization. From both a comparative and historical perspective, these legal developments in contemporary governance are revolutionarly, although sometimes taken for granted. In this regard, when comparing the minuscule budget and resources of the WTO with some non-economic UN agencies –not to say, the Bretton Woods institutions–, it is fair to make some kudos for its performance: in essence, the WTO is a prime example of low-cost but high-quality governance. In fact, the current annual budget is less than CHF 200,000,000, and 700 staff on regular budget, for its world-class Secretariat.[63] In short, this regime is no doubt one of the most efficient regulatory structures of global governance nowadays.

The WTO is a fascinating culmination of the collective project, initiated half a century ago around MFN-based trade, which currently puts flesh and bones on the progressive construction of a world market under common rules, through incremental layers of multilateral trade law. Within this long-term endeavor, it is reasonable to argue that the highly technical corpus of WTO law is a critical facility for such efforts to be progressively and effectively conducted.[64] The public good nature of a strong world trading system should not be underestimated, as we are better off with multilateral decision-making within WTO. Obviously, we can question the content of the current rules or its decision-making processes, as this book does to some extent in fact. However, it is reasonable to argue that sticking to this key infrastructure of global governance is in the interests of all, notwithstanding the imbalances deserving reconsideration and reform. For this reason, as Gary Sampson puts it, achieving a common understanding on the role of the WTO is an absolute

63 See 'Secretariat and budget', *World Trade Organization-Annual Report*, Chapter 8 (2014). On the role of the GATT/WTO Secretariat in trade negotiations and the long-term development of the world trading system see in particular H. Nordstrom, 'The World Trade Organization Secretariat in a Changing World', 39 *Journal of World Trade* 5 (2005): 819–853.

64 For the flavour of its high degree of legal sophistication see *WTO Analytical Index, Guide to WTO Law and Practice,* volume 1 & 2 (World Trade Organization 2007). Within the expert legal literature see, specifically, R. Bhala, *Modern GATT law* (Thomson Sweet & Maxwell 2005) and P. Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (Oxford University Press 2005).

priority.[65] The WTO law and architecture raises multiple conundrums and is certainly not free from flaws and contradictions. However, as a universal international organization, it functions under high-quality legal and procedural standards on top of a healthy regulatory dynamism. Paraphrasing Kenneth Dam, the law of the world trading system has never been a static set of substantive rules.[66]In this context, the regime has some leverage for adaptation and change, as flexibility from within has been more than just a buzzword since its inception.

Generally, pragmatic lawmakers value flexibility for the simple reason that they are not prophets;[67] flexibility tends to be a key element of regulatory design in any given legal system and, as such, a policy option oriented towards its sustainability. In this regard, by incorporating a wide variety of escape clauses, safeguards and exceptions which make it fairly adaptable to changing domestic circumstances, the GATT regime was a prime example in this respect. From the perspective of comparative international law, it originally gave form to a very flexible body of rules, incorporating 'pressure valves' to strategically reduce domestic tensions caused by trade adjustment, economic crises and others;[68] this flexibility, together with regulatory dynamism, have been key features of the long-term effective performance of the GATT/WTO regime.

For half a century, flexibility and rule-based dynamism have been core elements in the institutional design of the world trading system for half a century. Within the regime, tensions resulting from bilateral disputes can be solved on ad hoc basis as well as incorporated to its rulemaking agenda in order to work out generalized solutions.[69] In this regard, in fact, the WTO is now legally framed as a *permanent negotiating forum* in article III.2 of WTO agreement, incorporating the practice of GATT MTN Rounds into treaty ob-

65 Gary Sampson (ed), 'Overview', *The role of the World Trade Organization in Global Governance* (Cambridge University Press / United Nations University 2001) at 16–17.

66 K. Dam, *The GATT Law and International Economic Organization* (University of Chicago Press 1970) at 4–5.

67 I. Seidl-Hohenveldern, *International economic law* (Martinus Nijhoff 1992) at 42 –43.

68 R. Hudec, 'Adjudication of International Trade Disputes', *Thames Essay nº1* (Trade Policy Research Centre 1978) at 31–33.

69 G. Winham, *The Evolution*, op.cit.p.128.

ligations and thus embedding regular lawmaking within the regime. In this way, as Hoekman and Kostecki explain, the WTO functions as a multi-issue barter exchange.[70] In multilateral trade negotiations, in principle, the tensions over unsatisfactorily regulated issues, and over gaps or loopholes, can be channeled into its permanent negotiating forum, which is always able to amend the rules of the game, regulate *ex novo* or both. Later on, coming full regulatory circle, the dispute settlement mechanism is now available to adjudicate the outcomes and, in doing so, channel tensions towards eventual re-regulation in later rounds. In short, flexibility and regulatory dynamism is part of the WTO inner rationale.

Nonetheless, the intensity, breadth and range of issues involved in multi-issue barter exchange are qualitatively distinct from those of the pre-WTO days. MTN Rounds have become more drawn-out and difficult to conclude, not only for the increase in the complexity of issues but in the participants required to build consensus: the Kennedy Round was completed in 3 years (60 countries); the Tokyo Round took 6 years (102 countries), and the Uruguay Round lasted 8 years (133 countries). As a result, the WTO Millennium Round failed spectacularly in 1999 (Seattle), and the Development Round beginning in 2001 (Doha) is still in a loop. The task of concluding the Doha Development Round has become harder with 160 WTO Members at the table, as a highly-efficient dispute settlement mechanism is now ready to enforce the outcomes.

But is WTO dying from success? Evidently, producing balanced trade-offs in negotiations has become more complex. In fact, progress in Doha negotiations is proving difficult, particularly in addressing the concerns of developing countries, who are not merely rule takers anymore, and now in fact openly question unbalanced elements of the Uruguay Round, such as the TRIPS agreement among others.[71] As Silvia Ostry puts it, the WTO itself was a virtually last minute piece of the Uruguay Round, in which the deal was pretty much take it or leave it for developing countries, since the WTO agreement consisted of a single undertaking: the so-called 'package deal' and developing

70 For an analysis of the negotiating forum as a multi-issue barter exchange, see B. Boekman & M. Kostecki, *The Political Economy of the World Trade Organization: From GATT to WTO* (Oxford University Press 1997) at 56 –83.

71 See J. Braithwaite and P.Drahos, *Global Business*, op.cit.pp.3–4.

countries finally took it, notwithstanding its profoundly transformative implications.[72] It is partly as a result of this experience that the battle to deliver meaningful commitments in the Doha Round now proves so difficult, and the state of play does not look particularly encouraging. As a result, WTO is at a critical juncture, as the Round appears to be on hold after 13 years of global trade talks. Thus, driven by pragmatism, trade representatives have seriously down-scaled the original expectations, and are now working to deliver a face-saving deal for the Doha Development Round.[73] However, although much had already been agreed upon several years ago in some areas, the Round is still on hold due to minor tensions between India and the United States[74].

As David Gantz explains, the Doha round is in a loop due to deep differences between BRICS and Quad Countries. WTO efforts to implement the TFA agreed upon in Bali may be finally successful but other multilateral agreements are certainly problematic. In this sense, with regard to trade facilitation, implementation was blocked by India to protest Member demands in relation to possible future reduction of Indian government subsidies to Indian farmers. Thus, as WTO decisions require consensus, the TFA stalled. However, US and India agreed in mid-November of 2014 that India would be permitted to continue subsidizing agriculture, until a new agreement was reached, and India appears to have agreed to lift its objections to the TFA. Another significant area of potential negotiation is the green technology agreement as this could reduce tariffs on green technology goods to 5% or less, probably by 2015. However, since WTO discussions have stalled, agreement (voluntary among members) could be alternatively adopted outside WTO. In addition, the other key plurilateral negotiations that have some potential for agreement are those around the 1996 Information Technology Agreement (ITA), as this agreement comprising 80 nations, and representing 97% of world trade in IT products, is out of date because many new IT products have

72 S. Ostry, 'The Uruguay Round North-South Grand Bargain: Implications for future negotiations', *The political economy of international trade law: Essays in honor of Robert. E. Hudec* (Cambridge University Press 2002) at 287.

73 For a detailed analysis of the alternatives see D. Gantz, *Liberalizing International Trade after Doha: Multilateral, Plurilateral, Regional, and Unilateral Initiatives* (Cambridge University Press 2014).

74 J Bhagwati & P. Sutherland, *The Doha Round: Setting a Deadline, Defining a Final Deal, Interim Report from a High-Level Trade Experts Group* (2011).

been developed since its creation. In this regard, efforts to expand ITA stalled a year ago when China alone refused to agree to eliminate tariffs on an additional 200 tariff lines. Discussions between Chinese and US officials in November 2014 resulted in an understanding which should, in principle, allow completion of expanded ITA, eliminating tariffs on 1 US trillion dollars' worth of IT products. However, whether these negotiations conclude successfully or not, the fact is that multilateral trade negotiations in Geneva are not likely to be resumed in the foreseeable future, except perhaps on the peripheries through approval of the TFA, or an expanded ITA. Aside from that, some progress may be made with plurilateral agreements on services, and trade in green technology goods, either in Geneva or outside (eg APEC). TISA negotiations in this regard are moving very slowly, and it is still too early to gauge how and where –that is, inside or outside WTO– the results of these services negotiations could finally come about.

Delivering significant outcomes through MTNs is a difficult but not impossible task. As Eric Wyndham White would have framed it, 'there would be no great virtue in negotiations which were smooth and simple: the virtue is in concluding negotiations which are difficult.'[75] Nonetheless, as stalemates and lack of reach or ambition always have a price in world trade negotiations, the failure to deliver in Doha has channeled pressures towards so-called variable geometry within WTO (as so-called 'Plan B'), and thus for PTAs within the WTO framework, following the road of current plurilaterals in Annex 4 of the WTO agreement. Not surprisingly, for some observers, variable geometry could more easily facilitate WTO rulemaking, while providing incentives for later accessions by non-participating WTO Members such as, for example, the new GPA entering into force in 6 April 2014. For others, this *à la carte* strategy is a Trojan horse within WTO. However, there is also 'not much sympathy' for the plurilateral approach outside WTO, in WTO Director-General Roberto Azevêdo´s own worlds.[76]

The side-effect of the current difficulties to close the round is the resurge in

75 See E. Wyndham White, 'Press Conference of the Executive Secretary of the Preparatory Committee of the United Nations Conference on Trade and Employment', *Press Release No. 234* (11 July 1947).

76 See 'WTO members mull alternative scenarios as impasse continues', *Bridges/ ICTSD reporting* (6 November 2014).

PTAS which have, for decades, diverted trade and fragmented world market formation through myriads of bilateral, plurilateral and regional initiatives outside MFN-based principles. In this regard, parallel to the Doha negotiations, the US and the EU in particular are deploying their market access strategies to the hilt, by promoting a variety of new preferential initiatives outside WTO which go from traditional trade bilateralism to even pacific and transatlantic preferential agreements. The PTAs which the GATT architects conceived as minor exceptions in article XXIV –basically requiring that the preferential tariff reductions for PTA members must be 'substantially' on all products and that there must be a commitment to reaching full 100% reduction by a target date– are eclipsing non-discriminatory trade, and thus the inner mechanics and rationale of MFN-based trade. As a result, the world is paved with a wide variety of entangled preferential schemes promoting trade diversion, market segmentation and thus inefficient allocation of resources.

Since its early inception, the world trading system has been under continuous pressure to advance world market formation through progressive liberalization. The current form of article XXIV is a by-product of the complex times in which the regime was originally conceived. In this regard, for example, in light of the antagonism with the Soviet Union, Truman and other senior advisers considered that the US should not allow a split with Britain over the system of reciprocally-enacted tariffs between the dominions and colonies of the former British Empire (the so-called imperial preferences) so, finally, the US delegation was instructed by Truman to reach agreement even though these preferences were largely intact, as it happened in practice.[77] In addition, the US abandonment of the customs union requirement, and the extension of eligibility for article XXIV to free trade areas without external tariff, also has to be interpreted in the light of the need to accommodate negotiations for a secret US-Canada PTA. recently discovered by historians.[78]

Hence, in short, the drafting of article XXIV was not strictly driven by standard economics (eg. trade creation v. trade diversion, etc) but by a mixture of these with a set of ad hoc solutions aimed at keeping the whole project of the world trading system afloat in quite uncertain times, and thus not putting

77 F. McKenzie, 'GATT and the Cold War, op.cit.p.86.

78 For this study see K. Chase, 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV`, *World Trade Review* (2006): 1–30.

all eggs in the basket. In any case, however, the rules in place could have easily disciplined PTAs more than what they did in practice; however, the GATT community has applied a rather lenient interpretation to article XXIV since 1947. As explained by the experts group of 2011, in fact, PTAs has proliferated largely because the rules laid down in order to discipline PTAs were ignored in practice, and also because the so-called Enabling Clause (PTAs among developing countries) allowed developing countries to have intra-developing-country preferences without any legal limit. As a result, the generalized phenomenon of PTAs has created a systemic problem where these have continued to increase, thereby making the world trading system far less MFN-based than was envisaged when the exception was drafted.[79]

The problem of PTAs is not new but has exacerbated over the years. Today, the proliferation of PTAs not only harms WTO by undermining its credibility as a lawmaking forum, but also erodes its unparalleled dispute settlement system, by establishing alternative mechanisms marked by asymmetries of power and which are closed to third party participation. Reasonably, however, in both quantitative and qualitative terms, the proliferation of hundreds of 'me too' PTAs is neither an alternative nor a substitute to global trade opening by 160 countries.[80] As mentioned, the increased use of PTAs not only fragments trade rules and forums, diverting scarce trade policy resources (eg. negotiating resources), but also deflects efficient allocation of resources as well.[81] In essence, as Bhagwati explains, discriminatory trade misallocates world resources by shifting production from non-member lower-cost suppliers to higher-cost member country suppliers. Thus, PTAs create trade diversion as well as net welfare-reduction.[82]

Last but not least, PTAs structurally promote managed trade regimes and, in this context, are made to serve the special interests historically dominating the trade policies of developed countries.[83] In this regard, PTAs tend to be

79 See *World Trade and the Doha Round*, op.cit.p.18, paragraph 1.28.

80 See i.e *World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence* (WTO 2011).

81 J. Bhagwati, 'Reshaping the WTO', 168 *Far Eastern Economic Review* 2 (2005): 25–30.

82 See *World Trade and the Doha Round*, op.cit.p.18, paragraph 1.26

83 For the motivations behind developing countries to form hegemon-centered PTAs see J. Bhagwati, *Termites*, op.cit.pp.43–47.

used to extract not just trade concessions –such as provisions favoring the import of the rich country's intermediates– but non-trade related concessions as well, as PTAs tend to be easily captured by the lobbies of the hegemonic powers. In practice, lobbies from developed countries often tend to inoculate trade-unrelated agendas within the asymmetrical preferential negotiations with weaker trading partners. In short, one-on-one negotiations open the door to the increasing number of non-trade-related provisions –labor standards, environmental rules, FDI protection, the ability to impose capital-account controls in financial crises, IP, etc– being inserted into the US and EU PTAs. Obviously, larger developing countries have more opportunities to avoid including trade-unrelated agendas in their PTAs with the hegemonic powers (eg. Indian negotiations with EU). However, that does not happen for the rest when they are approached on a one-by-one-basis.

As developing countries are now more proactive in trade matters and more able to network and develop common fronts in the multilateral trade setting, concessions can be more easily extracted bilaterally. Multilateral trade negotiations are obviously not alien to lobbying as the Uruguay Round illustrates.[84] However, developing countries are comparatively less exposed within multilateral venues to pressure to accept non-trade related commitments; particularly as they can develop peer pressure. As clearly explained by Bhagwati, the political ability of hegemonic powers and the financial power of their well-endowed lobbies present a formidable combination to go up against.[85] To give just one graphic example, the US PTAs with Singapore and Chile impede restrictions on capital flows at times of crisis (capital-account controls) in line with financial lobbies, even it is unreasonable to do so, and though the IMF now openly admits that such policy restrictions often make sense as macro-prudential policy measure.

Therefore, it is no accident that the support provided by special interest from developed countries in PTAs negotiations has severely increased at the same rate that support for multilateralism has blurred. In this context, as a result, the United States is pushing for a decoupled strategy by negotiating in parallel two mega-PTAs through the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP); being the later

84 See, for example, chapters 3 and 7 of this book.

85 J. Bhagwati, *Termites*, op.cit.p.99.

the largest regional PTA initiative in history. On similar lines, the European Union is also pursuing its traditional preferential treaty schemes, obtaining its biggest successes lately with PTAs with Latin America, South Korea and Canada. In this regard, the traditional loose use of PTAS by the UE together with non-MFN-based trade vehicles such as S&D, GSP (Generalized Scheme of Preferences) and other discriminatory schemes displayed by the EU in its trade policy arsenal (e.g. Everything But Arms) is particularly illustrative.

The net welfare-reducing effect of preferential agreements is so evident that UN Members have committed themselves to 'develop further an open, rule-based, predictable, non-discriminatory trading and financial system' within Goal 8A of the Millennium Development Goals (MDGs). It is no accident that the high level trade experts group appointed by WTO to analyse WTO's past and potential future targeted PTAs as one of its major challenges.[86] As a result, nowadays, the so-called 'spaghetti bowl' of preferential agreements is, more than ever, a critical issue for preserving the nodal nature of the world trading system.[87] Probably, as the expert group has suggested, the pragmatic way forward is to find ways to lessen the discrimination contained in PTAs and to agree on new WTO rules that bring some order to the so-called deeper disciplines within the PTAs signed by the US and EU, as these cover such a large share of world trade.[88] Arguably, by establishing a new minimum common denominator on PTAs under negotiation, the Appellate body could also discipline some trade diversion *ex ante*.

3. Larger markets but fragile demos

By pushing forward economic integration, the world trading system has been a major contributor to development, sociability and peace for almost 70 years already. The legal infrastructures of world trade do not guarantee eternal peace but certainly help to reduce sources of inter-state conflict by means of

86 On the harm that the proliferation is causing to the world trading system see, in particular, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, and J. Bhagwati, *Termites*, op.cit., chapter 2 and chapter 3, respectively.

87 See J. Bhagwati, 'U.S. Trade Policy: The Infatuation with Free Trade Agreements', *The Dangerous Drift to Preferential Trade Agreements* (AEI Press 1995).

88 See *World Trade and the Doha Round*, op.cit.p. 51, paragraph 4.30.

increased economic interdependence. Partly for this reason, membership of WTO members has greatly expanded over the past decades, and open markets have steadily increased their advocates in last decades. The case for free trade is seen as stronger nowadays than at any previous time. In other words, protectionism is no longer a cool policy term in trade lingua. In a closely integrated world economy, goods and services come from literally everywhere, and an increasing number of jobs depend on trade today. As a result, the world economy has created its own anti-protectionism antidotes. Indeed, the idea that each time we segment market we incur a deadweight loss has become almost commonplace. By logical extension, more people both in developing and developed countries alike currently perceive trade in goods and services as welfare-enhancing on the aggregate. Obviously, the logic of free trade will always coexist with protectionism in practice;[89] however, it is reasonable to argue that the case for open markets is by now a robust one.[90] In this regard, the link between trade openness and overall economic prosperity (or aggregate GNP) is increasingly perceived by citizenship. Having said this, and notwithstanding that half a century of MTN rounds have boosted worldwide income, the dismantling of trade barriers is not a magic pill and does not necessarily obtain substantial upturns in GDP growth rates in all countries pursuing open trade policies. In this regard, trade is a facilitating device, requiring complementary policies to be in place, such as predictable legal environments, communications infrastructures, education, R&D among other macro-level policies including trade adjustment programs as well.[91]

We are all better off with rather than without WTO. Needless to say, the picture is nevertheless not so convincing for the critics, as they perceive how social and environmental externalities resulting from increasing interdependence are left unattended by the public decision makers who are constructing global markets. Not surprisingly, the absence of effective policies in these areas not only raises criticism by moderate citizens but also fuels the autarkic stances of those anti-globalization hard liners who frontally challenge open

89 J. Bhagwati, *Protectionism* (MIT Press 1988) at 77.

90 See eg. R. Feenstra, 'How costly is protectionism?', 6 *The Journal of Economic Perspectives* 3 (1992): 159–178.

91 On the case for strong trade adjustment policies under import competition see, in particular, J. Bhagwati, *Protectionism* (MIT Press 1988), and J. Bhagwati, *Import Competition and Response* (University of Chicago Press, 1978).

markets. However, the critics have it absolutely right in one aspect, and it is a big consideration: the lack of effective global policies regarding the externalities of open markets; in short, the still weak global polity and demos coexisting with world market formation. In fact, most critics basically tend to play versions of that pro-systemic discourse, irrespective of the issue involved.

Few, if any, of the trade representatives and officials participating in the Uruguay Round negotiations, would have foreseen how much controversy this regime would raise across the globe. Obviously, there has always been policy discussions about trade's social and environmental impact, and a wide variety of grass-root activists from both developing and developed countries tirelessly work to exact some policy shift, in one way or another, and have done so for decades. However, the attempts of proactive civic groups to influence how globalization is regulated only obtained a few minor successes within the Uruguay Round, including a few paragraphs in the WTO preamble, with regard to sustainable development and raising standards of living.[92] As a result, the critics denounce the absence of general decision making infrastructures for properly balancing economic interdependence with other social values; and they certainly have it right.

As conventional economics suggest, exchange based on comparative advantage, and thus specialization and division of labor is efficient on the aggregate. In other words, overall, the aggregate gains from world trade outweigh the costs, although there will be losers from trade liberalization. In this regard, it is necessary to provide generous adjustment assistance for those laid off in a way that can be linked to volatility from import competition.[93] In addition, increasing economic growth can lead to increasing redistribution: if the pie gets bigger, there is more to share through subsequent redistribution. This is easier said than done, obviously, and the conundrum is how to collectively implement socially sustainable economic interdependence. From the perspective of institutional design, the basic issue is whether it is a question of either remodeling the world trading system in order to correct externalities or, alternatively, rebuilding other global regimes in order to establish greater cohesion and adjustment programs by managing extra revenue raised

92 S. Aaronson, *Taking Trade to the Streets: The Lost History of Public Efforts to Shape Globalization* (University of Michigan Press 2004).

93 See eg J. Bhagwati, *In Defense of globalization*, (Oxford University Press 2004) at 33.

from the open markets erected by regimes such as WTO. Protectionism is certainly not an efficient way to deal with the social and environmental impact and concerns raised by open markets generally. Alternatively, supplementary policies such as trade adjustment programs for temporary income support, retraining, transition rules as well as strong redistributive programs generally are required, as mentioned. However, the current regulatory networks of global governance, including WTO as one of its key nodes, lack any effective commitment on social cohesion for the proper functioning of markets.

States have developed so-called world trade law –as a highly specialized sector of public international law– in order to secure open markets and thus allow firms trading in goods and services to operate with ease across nations. Obviously, open markets are directly dependent on public law and, in short, public decision-making generally. All inner infrastructures of any market, whether domestic or global, are based on public law. Thus, it is reasonable to argue tha elected representatives should do some more heavy-lifting to advance socially sustainable economic interdependence. In this regard, there is plenty of margin for giving shape to the so-called globalization with a human face; particularly by exacting extra revenue from world free movements of goods, services and capital in order to embed social cohesion in the regulatory architecture managing open markets.

Conversely, and while social cohesion do not tend to be tackled in diplomatic economic conferences, world trade law has entered into multiple grey areas, often touching the very core of trade unrelated social policies. In this regard, the frontiers of state regulatory autonomy have been blurred, as negotiations to remove so-called trade barriers have shifted from the realm of so-called negative integration to that of positive integration, in which domestic laws and policies (e.g. health, culture, education, professional qualifications, and so on) are made to comply /*converge* with pro-trade disciplines. Thus, the resulting impact on domestic public policies generally is significant. Today, the focus of liberalization is concentrated on non-border measures (or non-tariff barriers), with evident social implications. However, it is easy to see why the trade negotiations focusing on reducing the industrial tariffs still remaining do not raise the same social awareness and concerns as those tackling so-called non-tariff barriers. In this regard, a key issue at stake is the increasing regulatory complexity that negotiating in the grey areas implies from the an-

gle of general policy coherence.[94] The task of reciprocally bargaining down "trade barriers" is not only becoming increasingly complex but controversial, as these international re-regulatory endeavors both intersect and intrude into other legitimate policy areas and objectives.[95]

In principle, on a plain reading of WTO texts, it does not appear that there is a limit to the regulatory quest towards progressive liberalization. In practical as well as conceptual terms, progressiveness in itself means not just one dose, but regular extra doses: by definition, progressiveness always means more. In short, an endless opening is embedded in the regulatory DNA of WTO. Literally any domestic public policy can be within reach of the pro-trade open texture of the regime. It goes without saying that, by doing this, trade ministers often tend to pay lip service to the boundaries between their competences and those of other domestic and global agencies; and in fact, just about anything can be trade-related in one way or another. As a result, general policy considerations –in the sense of balancing issues in the public interest– are more often than not subject to simplistic regulatory dictums towards market formation. Paradoxically, while trade ministers have no expertise on how to tackle a wide variety of policy issues raised by global economic interdependence, non-trade policy expertise still remains 'outside' the world trade regime; inside the rooms and corridors of those uninvited domestic agencies with competences in all the policy fields we traditionally refer to as administration and/or government.

The problem can also be explained by stressing the limitations of functionalism in global governance.[96] In this regard, by extending multilateral lawmaking to trade policies behind the border, WTO Members –read trade ministers– often perform such tasks on the edge if not literally beyond both the

94 P. Lamy, 'Farewell statement of Director-General Pascal Lamy to the General Council', *WTO | Speeches and statements* (24 July 2013).

95 See G. Majone, *Deregulation or re-regulation?: Regulatory Reform in Europe and the United States* (Pinter 1990), I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation debate* (Oxford University Press 1992) and K. Vogel, *Freer Markets, More Rules* (Cornell University Press 1996).

96 See D. Mitrany, *The progress of international government* (Yale University Press 1933) at 128 and M. Ryan, Ch. Lenhardt & K. Tamai, 'International Governmental Organization Knowledge Management for Multilateral Trade Lawmaking', 15 *American University International Law Review* (2000): 1347.

very border of their domestic competences as well as –unquestionably– beyond their knowledge and expertise. At the same time, parliaments as well as heads of national governments tend to follow the policy lead of their economic agencies too loosely, by granting them with mandates allowing to negotiate treaties on both trade and non-trade policy areas, through which they have erected powerful regimes in which they take new policy decisions. This being the case, the public interest is often inevitably lost in translation.

Leaving aside that these practices do not easily produce welfare-enhancing outputs for the societies involved, it is also easy to see how both domestic and world policy coherence is manifestly lacking under the motto of open markets. A paradigmatic example of such phenomena is the TRIPS disciplines, which have not much to do with open markets, and that have pushed for world propertization of intangibles through WTO linkage (read world legal monopolies).[97] In a similar vein, although the ITO founding fathers in 1947 had already drafted a rulebook of binding disciplines on restrictive business practices (read antitrust law and policy),[98] there is still no multilateral antitrust treaty in place within WTO annexes nor is there one on the imminent horizon. As market openness is a key discipline in the global rules of the game today, the perplexities raised by this paradox are understandable for laymen and informed observers alike; arguably, as antitrust law and policy is a structural feature of the market economy paradigm, the irony of delinking them from open markets is more than evident.

Reasonably, as public law is inextricably related to the proper functioning of open markets, it is fair to say that the lens through which trade representatives pursue regulatory governance within WTO and other economic regimes is overtly simplified; transforming states into mere world facilitating agents of open markets and business transactions do not stand the litmus test of general interest, whether domestic or global, indistinguishably; the complex nature of social life arguably requires wider policy scopes and perspectives and, subsequently, more inclusive policymaking generally. In fact, in retrospect, states have never operated as mere facilitating agents of market transactions: by progressively giving birth to a territorially-circumscribed 'mar-

97 See chapter 5.

98 On the ideas of the drafters of the ITO Charter see W. Diebold, 'Reflections on the International Trade Organization', 14 *New Illinois University Law Review* (1994): 335–346.

ketplace' within their jurisdiction, domestic authorities have 'governed' and thus shaped the form and function of markets since the very early invention of nation-states. In addition, the past several centuries of market-formation built around territorially-circumscribed state jurisdictions differ from world markets in both quantitative and qualitative terms, as open markets are progressively extending their reach to the whole planet today. Hence, the qualitative change of what economic agencies are pursuing, by encompassing the whole world through international legal disciplines, has produced something more powerful, transformative and naturally distinct from the mere aggregation of 160 state-based marketplaces. A global market under common rules is not a mere aggregation of domestic markets and related state jurisdictions. Indeed quite a revolutionary project is underway.

Something is missing within the system of global governance. The globalization of markets without a cohesive and wider overarching polity able to exercise general policy decisions over their functioning does not appear to be particularly promising in systemic terms. Parliamentary democracy is still considered the best state-of-the-art vehicle for organizing large human gatherings through indirect representation. For centuries, the same nation-states within which public authority constructed a marketplace –circumscribed to their territorial jurisdiction– evolved to produce parliamentary democracies not without unease. Probably, world market formation should be framed against such historical background. In short, while we are pushing the fast-forward button for deeper global economic integration through public law, there is no such a thing as a global polity –not to say a global parliamentary democracy– able to guide and balance its transformative forces vis-à-vis the rest of the values involved in any meaningful idea of good governance.

For the sake of illustration, in an hypothetical case of absent trade, the production, distribution and consumption of goods and services, together with a wide variety of socially valuable related issues (eg. sanitary and phytosanitary measures, etc) would only be regulated within a single state-territory, and would thus fall into just one jurisdiction, with all its concomitant administrative authorities, regulators, courts and tribunals. However, since an increasing volume of goods and services is produced through the dispersed so-called global factory, business transactions and operations now take place across territorial jurisdictions and thus across domestic public laws. Paradoxically,

in this regard, the higher regulatory burdens of these transactions compared to those of global business transactions are quite telling.

In this regard, to use the same example, the regulatory approach towards process and production measures (PPMs) at intra-state level has no connection with that taken towards an equivalent transaction at inter-state level. In fact, they are not only disconnected but at odds, as there is a legal consensus entrenched in the world trading system not to regulate PPMs of imported goods and services. Inevitably, this has created a mismatch between the local and the global in which requirements for the global transaction basically proceeds within a sort of jurisdictional no place. Thus, even if there were no PPMs whatsover on both sides of the transaction –read the law of jungle– the transaction would legally take place.

Notwithstanding the fact that trade restrictions to correct externalities such as those related to PPMs are not generally the least-cost effective policy measure, world regulatory structures managing open markets should not arguably deduct environmental and social externalities. Alternatively, they should be approached more creatively, which obviously does not imply that this has of necessity to be pursued by taking anti-trade rationales. In any case, the rules of the game in place today do not allow discrimination regarding the way products and services are produced and distributed. As a result, states have very thin (or no) margins for regulating aspects other than physical characteristics of imported products, disregarding the policy objective. In short, and technically speaking, domestic measures linked to the non-physical aspect of products (NPAs) are not compatible with WTO law. In this regard, GATT/WTO law zeroed in on NPA and does not allow discrimination against physically identical foreign products on grounds which are not revealed in the product itself, such as the way in which is produced or distributed. As a result, trade restrictions for foreign products manufactured or distributed with non-sustainable or labor-unfriendly methods are WTO illegal.[99] However, it is reasonable to argue that environmental and labor issues are related to trade, and thus could be more coherently managed world scale with a little more sensitivity, and without inevitably needing to establish trade restrictions (or conditionalities) in this

99 See generally Ch. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing trade and social goals* (Cambridge University Press 2011).

area. And the point to make here is that, it is quite likely that improved but equally trade-enhancing policies could have alternatively been devised if non-trade ministers –such as labor, health and environmental ministers– had also come to the table with trade agencies negotiating those disciplines. However, they were not there.

The treaty-based WTO regime is a paradigmatic illustration of the current era of technocratic global governance: an era characterized by an increasing regulatory maze of expert rule-based systems often operating in legal and policy self-containment.[100] Thus, there is strong case to make for deeper inter-agency coordination in these and other areas. In short, the problem is that currently fragmented governance across autonomous world regulatory networks unavoidably has a bearing on the coherence of global public policies and international law.[101] The issue of unattended social and environmental externalities in world trade is a paradoxical example. Leaving aside that both global governance and international law have never been as coherent as pro-systemic legal literatures have traditionally portrayed, it is difficult not to question that there are some treaty-based regimes which have significantly higher leverage and influence (e.g. WTO, IMF, etc) than others which, in principle, are equally authoritative (e.g. UNESCO, WHO, ITU, etc). In essence, the 'who decides' is again an important part of the problem, and thus of the systemic solution. The case of the world trading system analyzed in these pages is an evident example.

As Picciotto has explained, far from creating a free world market, the WTO establishes a complex framework for coordinating the regulation of international economic transactions: as a result, the WTO covered agreements go well beyond trade, and effectively create requirements for a wide range of domestic measures to comply with international standards, many of them set by other organizations. Thus, as this scholar sustains, the WTO is placed at the intersection of a variety of international regulatory networks which have grown up gradually since the 1970s, as part of the globalization of both busi-

100 P. Zapatero, 'Modern international law and the advent of special legal systems', 23 *Arizona Journal of International and Comparative Law* 1 (2005): 55–75.

101 M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising From The Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 2006 (2006).

ness and business regulation: in doing so, the WTO established itself as an important nodal point of intersection for many of these networks.[102]

However, not all regimes are included in its specific regulatory node and, in addition, all those included are incorporated in a hub-and-spokes structure in which the WTO constitutes the regulatory apex; in short, no legal horizontality among regimes at first sight. In this regard, it is also fair to say that some of the technical difficulties faced by the WTO regime in advancing its policy agenda of open markets today derive not only from north-south tensions but from the absence of other policy rationalities at the negotiating tables. Greater coherence could be obtained through increased regulatory cooperation by the WTO (and thus trade ministers) with non-trade regimes (and thus non-trade ministers). In short, improving the coherence of world policymaking with respect to the WTO node requires expanding inter-agency regulatory coordination. As the WTO regime sails the concurring waters of other (non-trade) regimes and domestic agencies, coherence with all those public policy values reasonably require increased inter-agency cooperation.

Some time ago, the former Director General of the WTO Pascal Lamy portrayed the old GATT of 1947 as 'an ITO minus the elements of coherence', in the sense of lacking proper links between the opening up of trade and other policy areas (eg, global antitrust, social cohesion, etc).[103] Arguably, the picture can also be applied to WTO today. In short, major inter-institutional policy integration is required for improving the coherence of global governance generally. However, the WTO jurisdiction is part of a legal architecture for global governance that currently lacks a higher authority to eventually adjudicate both disputes with other multilateral regimes, as well as conflicts (antinomies) between rules and acts resulting from other treaty-based regimes. In consequence, conflicts between the social values protected by each tend to be solved under the rules of the more empowered regime in practice; which, to

102 See S. Picciotto, *Regulating Corporate Global Capitalism* (Cambridge University Press 2011), chapter 3.

103 See P. Lamy, *Crisis is opportunity to restore coherence in global economic governance*, WTO (8 december 2010) as well as P. Lamy, 'The Place of the WTO and its Law in the International Legal Order', 17 *European Journal of International Law* 5 (2007): 969–984

a great extent, lately happens to be the WTO, as a result of its highly efficient dispute settlement mechanism and related enforcement procedures.

In this context, the raising of social concerns about the thin democratic legitimacy of WTO is closely related to the restrictive rationality of functional regimes in global governance. With regard to WTO, institutional legitimacy is conventionally said to flow from above from the constitutional features of WTO law, and technical expertise from below (technocrats preparing new WTO rounds, WTO secretariat, as well as Appellate Body and panels).[104] However, for the critics, the reality of democratic governance or participation within the regime is basically reduced to indirect forms of accountability of its Members, at a local level.[105] The flaws are easy to see when these structures of technocratic governance are confronted with the ideals of democratic participation; as mentioned, however, solutions to deepen parliamentary participation in world decision making are not easy to enforce in practice. In this context, as Levy-Faur explains, we are now experiencing a transformation from representative democracy to indirect representative democracy, and now to second-level indirect representative democracy:

'Democratic governance is no longer about the delegation of authority to elected representatives but a form of second-level indirect representative democracy—citizens elect representatives who control and supervise "experts" who formulate and administer policies in an autonomous fashion from their regulatory bastions'.[106]

From the prism of regime-building, some of the challenging issues posed by the legal infrastructures of world exchange today are those related to the inability to properly balance all values involved, and thus the incapacity to subsequently deliver legal and policy coherence. In this context, as mentioned,

104 See e.g. R. Howse & K. Nicolaidis, 'Democracy without Sovereignty: The Global Vocation of Political Ethics', *The Shifting Allocation of Authority in International Law, Oxford and Portland* (Hart Publishing 2008) at 163-191 and R. Howse & K. Nicolaidis, 'Why Constitutionalizing the WTO is a Step Too Far: Legitimacy and Global Economic Governance after Seattle', *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution 2001) at 227–263.

105 R. Nickel, 'Participatory Transnational Governance', *Constitutionalism, Multilevel Trade Governance, and Social Regulation* (Hart Publishing 2010) at 209–250.

106 D. Levi-Faur. 'The Global Diffusion of Regulatory Capitalism', *The Annals of the American Academy* 598 (March 2005): 13.

the WTO node could probably improve its legitimacy and effectiveness by establishing effective bridges with other non-trade treaty-based regimes and their rules (i.e. WHO, UNESCO, etc). In this regard, it could be argued that the coherence of both global governance and international law cannot be improved in the absence of deeper inter-institutional integration.

For this reason, upgrading the world constitutive process is an urgent objective to pursue.[107] However, instead of sitting and waiting for such a development, it would be reasonable to help it along, in one way or another. In this context, the WTO Appellate Body is one of the best qualified and authoritative bodies for sending signals to both governments and parliaments in this constructive policy direction. The reasons are twofold: firstly, because it enjoys wide recognition and respect for its law and policy reasonability; and secondly, because the dispute settlement understanding –and its applicable rules and customary rules of interpretation– currently gives its members sufficient wiggle room to give the best of themselves as global jurists, and not just as experts in trade law. In short, there is a need to push for constructive and inclusive legal world visions, and that can also be partly promoted by setting incentives in this direction, also through adjudication.

The same year that WTO entered into force, Robert Hudec was recalling how treaties frequently claim to solve problems, but often merely paper over conflicting national positions; so given some time, the circumstances underlying the friction could change and hopefully make the conflict inconsequential. As this excellent scholar explains, 'whether this sort of political theatre is noble in purpose or otherwise, it is a very important part of the public law of international economic affairs'.[108] Not surprisingly, Hudec framed the Uruguay Round package deal as containing several examples of this 'kind of non-content', which is subsequently requiring scholars to ignore it in order to supply for 'a coherent meaning to laws that appear incoherent'.[109] Similarly, it would also be reasonable to add that WTO insiders and practitioners could also play

107 M. Reisman. 'Introduction', Jurisdiction in international law (Ashgate) at xxi.

108 R. Hudec, 'International economic law: the political theatre dimension', 17 *University of Pennsylvania Journal of International Economic Law* (1996): 10.

109 See R. Hudec, 'International economic law, op.cit.p.11. For the idea of 'constructive ambiguity' in treaty making see also J. Braithwaite and P. Drahos, *Information Feudalism: Who Owns the Knowledge* (Earthscan 2002) at 139 (referring to TRIPS negotiations).

a stronger part in such fine policy lines, by using the inner flexibilities within WTO law to open up windows, and thus reconsider some content.

4. Inside these pages

The legal construction of a global market economy requires inclusive policy rationalities or, in other words, avoiding self-contained economic policies. World policy coherence evidently needs inclusive policymaking, and that certainly applies to WTO. At the beginning of a new century, marked by increasing economic interdependence, policy coherence is still pending an upgrade within and across a wide variety of regulatory networks in which WTO is not just one but a systemic node. Nonetheless, the aim and purpose of these pages is not to explore how the WTO should be alternatively governed for the best but to explore the basic world vision permeating the architecture of its legalized values, as these stand today. In order to do so, the underpinnings of this great fabric are explored through a set of selected case studies. In the following chapters, the book first takes a look at the GATT historical experience in upscaling the use of rules and adjudication for the incremental empowerment of the regime within global governance (chapter 2), going on to subsequently explore in some detail a few so-called WTO disciplines, in WTO speak (chapters 3 to 7). The basic bullet-points are as follows:

- Construction of an expert legal system of international law (chapter 2 on legalization)
- Blurring of general and especial interest in treaty-making (chapter 3 on services)
- Linkage of propertized intangibles to trade (chapter 4 on knowledge)
- Trade delinkage from PPMs (chapter 5 on nature)
- Marketization of state tasks (chapter 6 on procurement)
- Structural commodification of objects and activities (chapter 7 on culture)

In short, the following pages explore some selected hits from the rulebook of progressive liberalization as it stands at the present time. As a whole, the text aims at taking a non-random walk around the inner rationalities creating the building blocks of this critical regulatory node. In considering the world

visions that have nurtured its substantive rules and subsequent state of play, the text leaves aside analysis of institutional features, with the exception of a few introductory notions covered in the second chapter.[110] In that chapter, the text focuses on the successful contribution made by the legal profession and culture to regime-building within the GATT. This piece begins by explaining how the GATT community managed to progressively move from diplomacy to law, not without considerable creativity, almost from the moment of its initially weak inception; regime-building is explored from both an historical and sociological perspective in order to analyze how old-school trade diplomats and lawyers, subsequently, managed to progressively devise from a so-called 'accidental organization' one of the most effective treaty-based regimes in history.

The third chapter takes the WTO General Agreement on Trade in Services (GATS) as a case study for exploring public-private partnerships (PPP) in economic rulemaking. Firstly, the chapter briefly explains how this regulatory vehicle designed to promote long-term progressive liberalization in the services sector got on board the Uruguay Round: it goes on to show how multilateral trade negotiations within this agreement improve market access and national treatment for foreign services providers as well as facilitate their participation in publicly provided services. Further analysis also explores how the GATS built-in agenda has set the stage for the opening of negotiations on the so-called 'disciplines on domestic regulation' in recent years, opening up serious public debates on making WTO enter a new policy landscape which departs from the conventional assumptions of what trade law conveys.

The following chapter focuses on the controversial relationship between environmental externalities and open trade, and explores tasks and activities promoted within WTO regarding this very issue. The legal disciplines of progressive trade liberalization currently delink open markets from sustainable standards of production and distribution. In this regard, three decades of 'trade & environment' debates have delivered minor advances in the quest for world sustainable production and distribution, as process and production methods (PPMs) are legally deducted from the regulatory structures of world economic interdependence, as a result of devices such as, among others, GATT provisions on 'like products'. Achieving non-trade restrictive solutions

110 For such reflections see P. Zapatero, *Derecho del comercio global* (Civitas 2003).

to deliver sustainable development in global production and distribution is not an easy task. Arguably, in any case, better policies to secure sustainability could be pursued. However, trade ministers do not particularly help by leaving the whole issue outside the regime, in the sole realm of less-well endowed environmental agencies, while at the same time merely deducting environmental costs from world production and distribution of goods and services. The chapter briefly approaches the status quo within WTO on this issue by dissecting trade policy assumptions as well as the intra-history of its limited opening to environmental sensitivity and values.

The fifth chapter takes the Agreement on Trade related aspects of intellectual property (TRIPS) as a case of study to explore how the world trading system embraced global propertization of intangibles by means of linkage to trade. It explains how TRIPS expands legal monopolies such as patents, which are taken as an illustrative example across the chapter, and thus have an impact on the traditional underpinnings of the market-economy by allowing IP holders to segment territories for proprietary technologies world scale under rights-based vertical hub-and-spokes schemes. Along these lines, the chapter also explains how, by virtue of linking IP to trade, WTO Members have transformed the terms of trade, and subsequently produced additional incentives for IP lobbies to increase pressure on both technology-exporting and importing countries for extra world propertization of intangibles, which is pursued today through a variety of so-called TRIPs-plus initiatives. Finally, the piece also explains how the TRIPS agreement has produced a form of global property, which is highly liquid and tradable and which often sets IP-based anticompetitive arrangements beyond the enforcement radar of global antitrust law and policy. In this vein, licensing is taken as an example to briefly illustrate the challenges faced.

The subsequent chapter takes a brief look to the Government Procurement Agreement (GPA), as this WTO covered agreement captures regulatory patterns and trends in the ways modern public administrations currently deliver public policies. Subject to a recent upgrade in both its provisions and coverage, the new revised GPA entering into force on April 2014 illustrates the long-term historical transformation in the way governments are framed and conceived at delivering their policies: steering, not rowing. Under a regulatory paradigm based on improving efficiency and best value for money, the 43

GPA Parties have reformed the 1996 GPA framework and thus significantly expanded the so-called global procurement markets. The interest of exploring the GPA also resides in the increasing appeal of WTO plurilateralism among some WTO Members, as a second-best to multilateralism. For some observers, in this policy lines, the plurilateral experience of the GPA to date could inform extra explorations on variable geometry within the WTO.

The final section of the book takes a look at culture from the law and policy perspective built into the world trading system. The dichotomy between culture as 'expressions within community' and culture as 'goods and services within market' is a quite telling case study to approach the inner assumptions of world trade law and thus to apprehend the WTO puzzle. In order to do so, these pages explore the legal position of culture within the world trading system, as well as its contrast with treaty-based strategies of resistance deployed by ministers of culture within UNESCO: namely the convention on cultural diversity. The chapter aims at contextualizing the competing legal world visions on this (trade / non-trade) issue which are regulated in divergent directions across the fragmented regulatory structures of global governance. To illustrate the diverse policy perspectives on culture, the final section displays a few self-evident policy alternatives in this area. The main reason to close the book with a chapter looking not only inside but outside WTO is that these global inter-ministerial battles –also briefly explored regarding the environment in last sections of chapter 4– vividly illustrate the formidable challenge of delivering coherence within the fragmented networks of technocratic governance.

Interdependence and exchange are powerful drivers of community, and thus intrinsically associated with our human (read social) nature, since our very first ancestors began gathering in small groups to make more of their lives, and not to merely survive. Multilateral cooperation to expand open trade, beginning halfway through the last century, is deeply linked to those key features of our social nature. These pages explore some selected issues and themes at the latter end of this long-term phenomenon. In this regard, they focus on some contemporary developments of this collective experience; as such, these are open reflections. Not surprisingly, the world trading system is not only a driver of interdependence and exchange but also a critical fabric having an inevitable bearing in our societies generally. Building cohesive

architectures within global governance, and thus also balancing open markets with a stronger global polity, is a prerequisite for enhancing sustainable human welfare. In using this perspective on policy, these pages frame the powerful regulatory dynamics of the world trade regime as it is seen to stand today, with lights and shadows, notwithstanding its great contribution to development, sociability and peace.

2

A history of regime-building at GATT club

1. Diplomacy by design

The building of the world trading system was to take a long and somewhat tortuous path, beginning in the summer of 1944, as the Second World War was finally coming to an end. It was at that time that the Charters of the International Monetary Fund (IMF) and the International Reconstruction and Development Bank (the World Bank) were designed in order to create an institutional structure for economic relations in the post-war period (Bretton Woods Conference). At the time, the negotiators hoped to establish an international organization which would progressively eliminate trade barriers.[1] In essence, the initiative arose as a reaction against the protectionism of the interwar period.[2] This was to be the third pillar of what was known as the Bretton Woods system.

The first policy proposal on the need for regime-building in the area of world trade was a United States government report issued in February 1945 (*Proposals for Expansion of World Trade and Employment*), which formally placed on the global public agenda the idea of creating an international organization specifically focused on reducing protectionism.[3] By October of the following year, the United States had already submitted a detailed proposal for the constitution of this new organization to the United Nations Economic and Social Council (ECOSOC). At its first meeting in February 1946, the ECOSOC brought up the idea of this 'Suggested Charter for an International Trade Organization of the United Nations',[4] and unanimously adopted a resolution to convene a United Nations Conference on Trade and Employment.

1 R. Gardner, *Sterling-Dollar Diplomacy* (Clarendon Press) at 31.
2 T. Flory, *Le GATT. Droit International et commerce mondial* (LGDJ 1968) at 2–3.
3 W. Diebold, 'The End of the ITO', *Essays in International Finance* 16 (1952): 3.
4 Doc U.N. EPCT/CII/1-66 (1946).

The conference, finally held in Havana between November 1947 and March 1948, would begin diplomatic negotiations to create an International Trade Organization (ITO).[5]

As a result, three preparatory conferences were held in London, New York and Geneva. During the London meetings (October and November 1946), a draft Charter was debated and drawn up, based on the original proposal by the US. At the same time, it was agreed to negotiate tariff reductions at the next meeting and a specific treaty framework was planned to safeguard these results. In the New York meeting, early in 1947, that instrument building on provisions in the draft Charter was drawn up under the title of 'General Agreement on Tariffs and Trade' (GATT).[6]

Thus, the preparatory conference in Geneva continued to work on the draft Charter (also known as Havana Charter) while pursuing the tariff negotiations at the same time. The reasons for this strategy were basically dependent on domestic US politics; at that time, the viability of the ITO as an international organization faced obstacles due to the internal political tensions between the US executive and legislative branches. Under the US Reciprocal Trade Agreements Act of 1934, in essence, Roosevelt's government was authorized by Congress to conclude trade agreements, but not to set up international organizations. Thus, as the Havana Charter faced an uncertain future,[7] the GATT text was envisioned as an interim arrangement in the wake of the uncertain ITO ratification, but had to exclude all organizational elements from its provisions.

Finally, 23 founding contracting parties endorsed the GATT in 30 October 1947, together with schedules containing the tariff reductions and tariff bind-

5 J. Viner, 'Conflicts of Principle in Drafting a Trade Charter', 25 *Foreign Affairs* (1947): 612–628.

6 J. Jackson, *World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade* (The Boobs-Merrills Company Inc 1969) at 43.

7 For a detailed account of the ITO negotiations see, in particular, S. Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (University Press of Kentucky 1996). For the specific diplomatic history within ITO negotiations giving rise to the GATT (and precise explanations on why it took its particular shape and form) see D. Irving, P.Mavroidis & A.Sykes, *The Genesis of the GATT* (Cambridge University Press 2008).

ings. These schedules covered some 45,000 tariff concessions and about $10 billion in trade. Both the form and substance of the GATT also drew heavily on the US bilateral trade agreements, particularly post-1935 trade agreements.[8] The GATT entered into force through a protocol of provisional application even before the United Nations Conference had ended, in 1 January 1948. The Protocol of Provisional Application contained a clause that provided for Part II to be applied 'to the fullest extent not inconsistent with existing legislation'.[9] The underlying reason for this haste was again due to domestic US politics, as the Reciprocal Trade Agreements Act granted the executive a congressional authorization to negotiate trade agreements (renewable for three year periods) which was about to expire.

The Final Act authenticating the text of the Havana Charter was signed in March 1948 by 53 countries,[10] covering a wide range of issues that had never before been tackled by any previous economic diplomatic conference.[11] However, unlike the trade policy provisions, the chapters on employment policy, economic development, commodity agreements and restrictive business practices, were relatively new matters and, paraphrasing Bob Hudec, did not rest on the same degree of consensus.[12] In any case, while waiting for the subsequent and unclear ratification of the Charter, an Interim Commission for the International Trade Organization (ICITO) was created, as an ad hoc secretariat for the weak new trade scheme, moving from Lake Placid (New York) to Geneva. This interim UN subsidiary body, based at the Palais des Nations in Geneva, would play a crucial role in GATT regime-building, under the critical leadership of Eric Wyndham White (1947-1968),[13] its first 'Executive Director'.[14] The ICITO

8 R. Hudec. 'The GATT legal system, op.cit.p.616.

9 For the efforts of the GATT Secretariat in 1965 to propose that governments undertake 'definitive' instead of 'provisional' acceptance but with reservation from pre-existing legislation see See GATT Doc L/2375 (5 March 1965).

10 See UN Doc E/Conf2/78, *Final Act of the United Nations Conference on Trade and Employment* (24 March 1948).

11 W. Clayton, 'Foreword', in C.Wilcox, *A Charter for World Trade*, op.cit.p.vii.

12 R. Hudec, 'The GATT legal system, op.cit.p.620.

13 Following Francine McKenzie, there can be few heads of international organizations who rival Wyndham White for the widespread high regard in which he was held. See F. McKenzie, IO BIO, *Biographical Dictionary of Secretaries-General of International Organizations* (13 March 2012).

14 White became the first Executive-Secretary for the ICITO. The title for the position

was to be a cornerstone of the GATT from the moment that trade delegates and diplomats realized that ratifications of the Charter were not going to materialize. In practice, the project of a rule-based multilateral trade regime was kept alive thanks to that minimal institutional structure and the notable individuals working within it. Thus, with the passing of years, the ICITO staff ended up becoming de facto the GATT secretariat.[15] With the help of the people from the ICITO, in fact, the GATT Contracting Parties went on to organize their first two rounds of tariff negotiations in the following two years (Annecy 1949 and Torquay 1950), inaugurating the famous GATT MTN Rounds.

In December 1950, the US government finally made public its decision not to submit the ITO Charter to the US Congress for ratification. The decision paralyzed the ratification processes in a context in which the United States had become the major political and economic power of the post-war international order. Consequently, pragmatic solutions were sought to give the GATT a certain institutional structure somehow. Making a virtue of necessity, article XXV entitled 'Joint Action of the Contracting Parties' became the focus around which a minimum organic structure would be cautiously built for the GATT to function. Interestingly, this provision enabled trade representatives to create an organization from almost nothing. In practice, a new body was invented, under the noun 'CONTRACTING PARTIES', written in capital letters to differentiate from the Contracting Parties taken as individuals. The open wording of Article XXV transformed the provision into the ideal legal basis for progressively shaping a wide institutional structure:

'The Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement'.

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progressively changed as the non-organization developed, under his leadership. Thus, in 1957, White became Executive Secretary to the Contracting Parties of GATT in 1957. A few years later, in 1960, the title would change again to Director General of the Contracting Parties of the GATT. See J. Jackson, *World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade* (The Boobs-Merrills Company Inc 1969) at 148–150.

15 J. Jackson, *World Trading System: Law and policy of international economic relations* (MIT Press 1989) at 37.

Paradoxically, clinging to this raft, the Contracting Parties acting jointly as CONTRACTING PARTIES would manage to intelligently overcome a weak institutional framework.[16] Not surprisingly, the project led by the ICITO Secretariat faced a complicated and drawn out process. In any case, however, the regular meetings of trade representatives (the so-called 'Sessions') were able to slowly and consensually set up the minimum structure for managing the GATT, and thus for keeping regime-building going. This was a period of great uncertainty, a time of cautious and careful experimentation in filling in the gaps in the institutional deficiencies of the GATT regime.

It would take some time for the US Congress to legitimize the GATT. At the 1951 extension of the Reciprocal Trade Agreements Act, a section read as follows: 'The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade'. In these difficult circumstances, the ICITO Secretariat *de facto* became the GATT 'Secretariat' and provided the strategic impetus for developing its basic organic structure.[17]

Given this state of affairs, the CONTRACTING PARTIES created the Ad hoc Committee for Agenda and Inter-Sessional Business in its ninth session of 1951.[18]The Committee met some weeks (from four to six) prior to the meetings of the former in order to compose the collective agenda. For the purpose of regime-building, interestingly, joint decisions were adopted and a voting system was allowed whereby the voters' presence was not required, as mail and telegraph were permitted as a means of voting. At last, once it was certain that the ITO Charter would never enter into force, all that remained for trade delegates was to push for institutionalization by progressively developing the Ad Hoc Committee. In practice, the Committee would become the 'guardian' of the GATT in subsequent decades and, in fact, it led to the establishment in 1960 of the GATT Council of Representatives, as the

16 See J. Jackson, *The World Trade and the law*, op.cit.pp.132-136, J. Jackson, *The World Trading System,* op.cit.p.90 and J. Jackson, *The World Trade Organization: Constitution and jurisprudence* (RIIA 1998) at 83-84.

17 See R. Hudec, 'The Role of the GATT Secretaríat in the Evolution of the WTO Dispute Settlement Procedure', *The Uruguay Round and Beyond. Essays in Honour of Arthur Dunkel* (Springer 1998) at 105 and J. Jackson, *The World Trading System*, op.cit.p.37.

18 BISD II (1952) p.205.

permanent GATT body to undertake work between the regular sessions of the Contracting Parties.[19]

However, the trade diplomats who negotiated in Havana did not give up their efforts to obtain full international legal personality for the GATT. Thus, these trade representatives renegotiated and drew up a second Charter proposal for an Organization for Trade Cooperation (OTC) in the ninth meeting period from October 1954 to March 1955.[20] This initiative also fell by the wayside; and it therefore became clear to the GATT community that the only viable strategy for slowly extending the organizational fabric was to create a highly professional Secretariat, and begin operations by establishing some working groups and committees under a common agenda. As a result, the post of Executive Secretary was finally created in 1955, an office that was already being informally held in any case by Wyndham White since his early days at the ICITO. The game played under his leadership remained focused on slow and cautious regime-building,[21] in a complex policy context in which ECOSOC had become a forum for GATT's detractors in a widely endorsed resolution aiming at studying alternatives to GATT which would be adopted a year later.[22]

The Executive Secretary was to play a critical role in building bridges among delegations, in order to progressively build up the whole infrastructure, mandate and legitimacy of the accidental organization.[23] As Kenneth Dam portrays him, 'at every major turning point and in every major success in GATT history has figured an imaginative compromise, an unexpected initiative, or a face-saving formula originated by Wyndham White'. In the words of Braithwaite and Drahos, by the time he retired in 1968, with the title of DG of

19 BISD 9S /17-20 (1961).

20 See K. Dam, *The GATT: law and international economic organization* (1970) at 337–338.

21 See W. Eckes, 'In Globalization, People Matter: Eight who shaped the World Trading System', 4 *Global Economy Journal* (2000): 303–314.

22 See *World Economic Situation: Measures for the Development of Trade Co-operation*, 22nd Session, UN Doc E/AC.6/L160 (28 July 1956) as well as Summary Record of 206th Meeting of the Economic Committee, ECOSOC Doc E/AC.6/SR.206 (30 July 1956), in particular.

23 For a fine biographical sketch of this 'towering figure' in GATT history see, in particular, R. De Souzas Farias, 'Mr GATT: Eric Wyndham White and the quest for trade liberalization', 3 *World Trade Review* (2013): 463–485.

the GATT, 'he had forged an unconstitutional, temporary GATT into the most powerful, entrenched non-organization the world had seen'.[24] Illustratively, right at the beginning of the 60s, Wyndham White was framing the GATT in the following terms:

'The General Agreement on Tariffs and Trade, as its name clearly indicates, is, juridically speaking, a trade agreement and nothing more. But because it is a multilateral agreement and contains provisions for joint action and decision it had the potentiality to become, and has in fact become, an international 'organization' for trade cooperation between the signatory States'.[25]

Thus, a workable GATT regime was already in place, and would be carefully nurtured by a small community of trade diplomats and technocrats. From there to the signing of the WTO agreement in April 1994, four fascinating decades of regime-building would get underway. To paraphrase Kenneth Dam, the GATT was the humblest if not the neediest of the many international bodies on the world scene; yet in terms of success it ranks among the highest achievers: this initial disadvantage was largely overcome thanks to the persistence of a dedicated and pragmatic Secretariat, with the remarkable help, political will and leadership of key Contracting Parties such as the US.[26] In practice, despite the fact that it was not an international organization at the outset, the GATT gradually evolved to become a strong regime in its own terms.

In the interim, it operated precariously for almost half a century. In order for GATT to have entered into force, the instruments of ratification or acceptance should have represented 85% of the external trade of the territories included in Annex H. However, only Haiti accepted the GATT (7 March 1952) in conformance with article XVI (*Acceptance, entry in force and registration*).[27] Therefore, the GATT did not technically enter into force: under the 1947 *Protocol of Provisional Application and subsequent Protocols of Accession*, the GATT

24 See J. Braithwaite & P. Drahos, *Global Business Regulation*, op.cit.p.177.

25 See E. Wyndham White, 'GATT as an International Trade Organization' (public speech), *Polish Institute of International Affairs* (Warsaw, 6 June 1961).

26 K. Dam, *The GATT Law and International,* op.cit.p.335.

27 Liberia also accepted the GATT on 17 May 1950, but withdrew on 13 June 1953. See *Analytical Index of the GATT: Guide to GATT law and practice*, at 924.

was in fact to be under provisional application for the following decades.[28] Paraphrasing Jackson, the GATT had a 'dubious legal status' which has inevitably led to misunderstandings both by the general public and the media, and even by government officials.[29] Logically, this could have led to a variety of challenging legal issues and questions. However, interestingly, the constitutional and international legal literature rarely raised this issue in detail.

Provisional application did not bring into question the legal nature of this instrument,[30] but rather the way of going about things, given that parliamentary democracies did not take much part in developing this critical node of global exchange until the mid-90s!! Half a century of provisional application, without parliamentary ratifications, is a rather long process and, as such, an interesting issue for analysis. As such, Jan Klabbers chose the GATT as the most famous example of how provisions on the entry into force of treaties is not the best indicator of the binding nature of such treaties.[31] Nevertheless, this situation influenced the way that things were done within GATT during that long period. In this respect, for example, it is quite illustrative that the initials of the ICITO were formally displayed at the GATT headquarters for many years.[32] Equally interesting is the fact the United States Congress authorized its annual contributions to the GATT in the budgetary section of 'international conferences and ancillary costs' until 1968. Hence, during their early years, the building of the post-war legal infrastructures for open markets basically advanced keeping the organization's head above water.

John Jackson refers to the 'fiction' that the GATT was not an 'organization'

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28 See J. Jackson, 'The Puzzle of GATT', 1 *Journal of World Trade Law* 2 (1967):133, note.14 and E. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948', 31 *Common Market Law Review* (1994):1162.

29 J. Jackson, 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects', *The WTO as an International Organization* (University of Chicago Press 1998) at 163.

30 See article 25 of the Vienna Convention of the Law of the Treaties (provisional application).

31 J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International 1996), pp.75–76.

32 P. Nichols, 'GATT Doctrine', 36 *Virginia Journal of International Law* 2 (1996): 390, note 57.

but had generally avoided the adjective 'international', whenever he referred to it in his early legal writings. In line with this, the section on this matter in his classic work *The World Trading System* (1989) is indicatively entitled 'the GATT as organization'.[33] In his words, the General Agreement did not establish an organization 'in theory', although 'in practice' operated as one[34]. In turn, other scholars maintain that the GATT was neither a treaty nor an international organization[35]. Similar differences of approach regarding this issue permeate the legal literature. In Spanish scholarship, for example, Remiro Brotons contends that it was understandable that, for international legal experts, the GATT was a clumsy instrument due to its evident inability to survive in defiance of the most basic legal standards and forms; furthermore, Brotons goes so far to state that the GATT lacked international subjectivity.[36] For other scholars, such as Liñán Nogueras, the GATT operated 'on the basis of a somewhat conventional provisionality and with an organic element that was far from formal constructions'.[37] By contrast, Pastor Ridruejo holds that the CONTRACTING PARTIES of the GATT 'empirically created' an international organization.[38]

The international legal literature exploring these questions offers diverse legal interpretations regarding this very issue. Certainly, the GATT was a curious experiment, both unusual and innovative, which was to progressively grow in strength despite its serious 'birth defects'. The old-school GATT diplomacy managed to progressively develop one of the most effective and powerful regulatory regimes in contemporary world history. As mentioned, the success of GATT 'as an organization' was due to the efforts of a very small community of trade diplomats who managed intelligently to sustain and reinforce its originally precarious set of rules against the odds of its flawed origins. In the words of Hudec, a 'slow incremental development' was the secret to the

33 J. Jackson, *The World Trading System*, op.cit.p.37 and 41.

34 J. Jackson, *Legal Problems of International Economic Relations. Cases, Materials and Text* (West Publishers 1995) at 289.

35 P. Nichols, 'GATT Doctrine', op.cit.p.390.

36 A. Remiro Brotons, 'Pelagattos y Aristogattos de la Comunidad Europea ante el Reino de la OMC', 26 *Gaceta Jurídica de la Comunidad Europea* (1996):17–18.

37 D. Liñán Nogueras, in M. Diez de Velasco, *Instituciones de Derecho Internacional Público* (Tecnos 2011) at 615.

38 J. A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (Tecnos 1996) at 823.

GATT's legal success over all these decades.[39] As a result, the GATT community ended up organizing eight MTN Rounds, until finally an international organization with a remarkable institutional design and fully fledged international legal personality came into being, when WTO burst onto the scene of global governance on 1 January 1995.[40] In short, the success of GATT's regime-building is an unprecedented experience in the history of global governance. It vividly illustrates how the strong political will of a minor group of peoples –mainly comprising trade diplomats and officials– was able to keep the flame of open markets alive in a precarious and provisional context, for decades. The peculiar and tortuous path towards its institutional consolidation since its weak inception after the Second World War has in fact led some literature to qualify the GATT as an 'historic accident',and these observers are not far wrong,[41] as the so-called GATT club successfully challenged all traditional legal standards of its era.

2. The rule-based system

The development of the world trading system is a landmark in contemporary world history. In order to understand how this regime came about, transforming itself into WTO, it is particularly illustrative to focus on the community of professionals that 'chipped away' tenaciously over decades to construct a dispute settlement mechanism within a regime under provisional application. The first by-product of their collective effort was the invention of GATT panels, which with the passage of time gradually became formalized, until its final transformation into a first ever and brand new world tribunal in January 1 1995; a mechanism that is sometimes portrayed, in its own rights, as the jewel in the crown of the WTO.

Law, lawyers and adjudication have played a changing role in the world trading system from the earliest days of its precarious inception. In this regard, one of the most interesting phenomena arising from the experience of re-

39 R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers 1993) at 364.

40 R. Hudec, *Enforcing International Trade Law*, op.cit.p.364.

41 T. Flory, *Le GATT. Droit International*, op.cit.pp.4-5 and G. Curzon & V. Curzon, '"GATT: Traders´ Club, op.cit. p.31.

gime-building in the GATT is the diverse and changing uses of law and adjudication within the body. In fact, the history of world trade liberalization since the end of the Second World War –and thus the origins and foundations for global economic interdependence– cannot be effectively grasped without paying attention to this phenomenon. In essence, the world trading system has passed through five main stages with regard to rule-based adjudication. Basically, these stages have defined and redefined half a century of global economic interdependence, first with regard to trade in goods (GATT 1947-1994) and finally also in terms of services (GATS 1995) as well as propertization of intangibles (TRIPS 1995):

- *Phase 1*: a first 'legalist' stage, which dominated the drafting of the GATT and its amendments at the end of the nineteen forties (1946-1947);[42]
- *Phase 2*: a long 'pragmatic' stage (focused on consensus-building), which governs its administration and the interpretation of legal texts over the next twenty years (1947-1970s);
- *Phase 3*: a third stage of relative inactivity regarding rule-based adjudication, which covers the decade of the 70s, and concluding in 1979 with the new rules resulting from the Tokyo Round;
- *Phase 4*: a following stage which began in the 80s when the focus returned again to law as the preferential technique to develop solutions for trade disputes.
- *Phase 5*: a current fifth stage characterized by fully-fledged hyper-legalization.

In the beginning, the evolution of GATT starts out with a markedly diplomatic approach. Initially, the first delegations considered that diplomacy (not law) should be the main tool for resolving inter-state differences in GATT. The collective attitude was best summarized by John Jackson, as leaving 'legal technicalities' to one side.[43] By that time, the legal approach was viewed with criticism and even certain mistrust. The reason is simple: as explained, the GATT of 1947 was basically a tariff-liberalization agreement lacking appropriate institutional structures. Since the ITO Charter failed to pass through the US Congress, the agreement was under provisional application and, in

42 K. Dam, *The GATT Law*, op.cit.p.4.

43 J. Jackson, 'The Puzzle of GATT', 1 *Journal of World Trade Law* 2 (1967): 132.

consequence, in a precarious situation for playing the hard-law game. Therefore, the Contracting Parties administered the GATT under consensus, and stayed focused on consensus-building for a long period, as a means of surviving while awaiting better days: at that time, consensus-building was the name of the game, built around a loose but intelligently administered article XXV.

In this way, during the first few decades of the GATT, an eminently diplomatic approach governed the administration of GATT rules. As Robert Hudec portrayed it, the GATT of this period operated as a diplomatic instrument.[44] In the words of the last Director General of the GATT of 47, Olivier Long (1968-1980), emphasizing the importance of the diplomatic approach at that time: 'legalism does not contribute to trade liberalization'. For this former Director General, the primary objective of the dispute settlement procedures was not to decide who is right and who is wrong but to proceed in such a way that even significant violations 'are only temporary and are terminated as quickly as possible'.[45] This policy vision, however, slowly lost support as the GATT became more firmly entrenched as an organization.

Thus, the strong consensus-building culture in the GATT´s epistemic community developed, expanded and reinforced the bits and pieces of an originally weak instrument (under purely provisional application) to incrementally construct one of the most highly effective nodal regimes of global economic governance. Only after the trade diplomats managed to deliver six consecutive tariff Rounds, the GATT regime was basically consolidated, and a more legalist approach (based on state rights and obligations) gradually begun gaining credence. As a result, legal compliance slowly moved centre stage, as the preferred approach to trade disputes.

Literally, diplomacy died by success. By regularly lowering tariffs, the consensus-based former GATT was ready to jump to a compliance-based hard-law regime. However, the triumph of law over diplomacy was not achieved without strong policy tensions. The debate over the relative weight of legal rules vis-à-vis diplomacy within the world trading system not only would involve

44 R. Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence', 4 *Journal of World Trade* (1970): 615.

45 O. Long, *Law and Its Limitations in the GATT Multilateral System* (Martinus Nijhoff 1987) at 71 and 73.

discussions on the most effective methods and techniques to solve trade disputes but also, and inevitably, cultural clashes with regard to the best professional qualifications to participate in the new policy era.

The debate over balancing diplomacy and law inside GATT decision-making, as Jackson recalls, has a long history.[46] However, it was during the nineteen eighties that these two main philosophies –diplomacy and law– came into conflict, both in respect of the GATT dispute settlement mechanism (*panels*) and, by logical extension, with respect to the inner functioning and development of the world trading system.[47] The competing perceptions with regard to the direction of the mechanics of dispute settlement (and GATT as a *functional* regime itself) were often encapsuled in a basic and clear-cut dichotomy: (1) legalism vs pragmatism or, in other words, (2) rule-based approaches vs diplomatic approaches.

Recalling that period, for example, William Davey, the first Director of the WTO legal service (1995-1999) attributed greater emphasis on negotiation and consensus as opposed to the 'anti-legalist' approach, and an accentuation of adjudication (dispute settlement by third parties) to the 'legalist' approach.[48] This policy battle had a critical importance for the world trading system from a functional perspective. However, as mentioned, the battle was not only over defining the preferential techniques for administering the evolution of the GATT but also inevitably over the professional qualifications of those individuals best suited to do the job. Ultimately, legalism and the increasing influence of both the legal profession and trade law scholars would shift the power-relations inside the GATT community towards the so-called 'rule-based approach'.[49]

The inauguration of the *Journal of World Trade Law* in 1967 was also a mean-

46 See J. Jackson, *The World Trade Organization*, op.cit.p.63.

47 See 'Review of the Effectiveness of Trade Dispute Settlement under The GATT and the Tokyo Round Agreements', *Report to the Committee on Finance, U.S. Senate, on Investigation Nº332-212 Under Section 332 (g) of the Tariff Act of 1930,* USITC Publication 1793 (December 1985) at 68.

48 W. Davey, 'Dispute Settlement in GATT', 11 *Fordham International Law Journal* 1 (1987): 66 and 97.

49 See R. Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', 44 *Duke Law Journal* 5 (1995): 846 and note 81.

ingful sign of the times, by mainstreaming world trade law into academia. But more significantly, it is no coincidence that one of the leading intellectual figures behind the idea of creating a brand new rule-based international organization at the Uruguay Round, John Jackson, also distinguished between a 'diplomatic approach' and 'rule-based approach' in GATT.[50] In fact, this academic authored the first legal monograph on GATT, as early as 1969.[51] It goes without saying that what he coined as 'rule-based approach' meant a primary role for law in practice, with a few subtle pragmatic considerations. As Jackson explains, the tension was therefore a question of degree, of preponderance of one element over another, more than an extreme confrontation in the sense of a zero-sum game.[52]

In the earlier stages of the GATT, even the legal nature of its rules was questioned. Bob Hudec's comments regarding the characterization of the GATT rules in 1978,[53] as well as those on the GATT legal system a few years before (1970), are particularly apposite reflections on this theme:

'The key to understanding the GATT legal system is to recognize that GATT's law has been designed and operated as an instrument of diplomacy. Although the GATT legal system has many points in common with domestic models, the thing which sets it apart from others is the overriding concern for 'flexibility' –the insistence that the law's coercive pressures be applied in a controlled fashion which allow room for maneuver at every stage of the process.[54]

In short, the rule-based approach was a critical development in modern history of economic interdependence. Interestingly, some observers also attributed the diplomatic and rule-based approach to the behavior of some key GATT Contracting Parties. Thus, the US-originated literature tended to define the general attitude of the United States as 'a legalist approach' and that of Japan and the European Community as a diplomatic one.[55] Similarly, a

50 See J. Jackson, *Restructuring the GATT System* (Council on Foreign Relations Press 1990).

51 See J. Jackson, *World Trade*, op.cit.p.43.

52 J. Jackson, *Restructuring*, op.cit.p.59.

53 R. Hudec, 'Adjudication of International Trade Disputes', *Thames Essay n°1* (Trade Policy Research Centre 1978) at 31–33.

54 R. Hudec. 'The GATT legal system, op.cit.p.665.

55 See for example, *inter alia,* W. Davey 'The WTO/GATT World Trading System: An Overview, *Handbook of WTO/GATT Dispute Settlement* (Kluwer law international 1997) at 75.

report on the dispute settlement mechanism drawn up by the US Senate in 1985 identified the United States, New Zealand, Hong Kong and Australia as Contracting Parties which perceive GATT as a set of binding obligations; conversely, Japan and the European Community were characterized as favoring a 'flexible approach', based on negotiation and consensus: 'to the [European Communities], diplomacy rather than adjudication is argued to be the intended GATT philosophy, and third-party adjudication was not conceived of as requiring policy changes'. From that perspective, as the report added, the nature of GATT as an instrument regulating rights and obligations would be de-emphasized.[56]

Also the more legalist approach attributed to the United States in that period was occasionally associated with an alleged traditional higher reliance of Americans on law and litigation. In line with this thesis, greater adhesion of the US administration to legal tools in the GATT would be more a cultural issue than a question of interests.[57] However, this approach was arguably more influenced by the fact that the GATT was drafted under the indisputable leadership of the United States following the Second World War; and thus was also better adapted to its basic policy vision and economic interests. Reasonably, the more legalist approach of the European Union in WTO today could be explained by the same token: following the Uruguay Round, the rules of the game better reflect its aggregate interests; as a result, legalism also makes greater sense for Europeans.

Last but not least, legalism is naturally connected to general perceptions among world trade experts and practitioners with regard to the aggregate benefits resulting from participating in an open trading system. The greater or lesser legalist behaviour of trading nations with regard to the WTO can be probably best explained as such. At the present time, the rule-based approach is the overarching pattern that defines the functioning of the WTO in most of its disciplines, excepting those regarding PTAs. Therefore, looking back, 'legalism' has not produced a 'poisoning of the atmosphere' of the multilateral trading system but quite the contrary; it has also strengthened it for a long

56 See *Review of*, op.cit.p.68.

57 R. Ostrihansky, 'Settlement of Interstate Trade Disputes: The Role of Law and Legal Procedures", *Netherlands Yearbook of International Law* (1991): 180.

time.[58] Currently, the vast majority of the world trade community defends the benefits of a strong WTO legal system and a rule-based approach in settling disputes[59]. The almost 70 years of the world trading system have ended up by persuading the many critics that such an approach is the most effective one for all. As Hudec recalled, social institutions tend to follow a pattern of maturing from informal processes involving accommodating interests, to formal processes based on pre-established norms. This is clearly the case of the rules within the GATT/WTO regime. In essence, the key to success in the long term was considered to be the progressive circumventing of power politics by promoting increased compliance with the rules of the game. Under that approach, however, multilateral negotiations of new rules have become increasingly complex. Evidently, a binding dispute settlement mechanism with teeth to authorize the suspension of trade concessions not only operates as a powerful lever for obtaining compliance with pre-existing commitments but also raises the stakes for negotiating new law.

3. Inventing adjudication

Historically, the use of dispute settlement mechanisms in free trade agreements was not seriously considered until the ITO was drafted,[60] although the establishment of a world trade tribunal is obviously an older idea. In fact, Huston Thompson –a US prominent government official under Woodrow Wilson's policy orbit– already suggested in 1919 the creation of an international trade tribunal to be incorporated into the Versailles Treaty, and advocated its development for several years.[61] Aside from the proposals of visionary individuals, the first serious diplomatic moves in this policy direction were the ITO negotiations. Originally, it was agreed that the Charter rules would be justiciable in the United Nations International Court of Justice (ICJ). However, the idea of adjudication that prevailed at that time among some key trade

58 W. Davey, 'Dispute Settlement in GATT, op.cit.pp.70–72.

59 See for example, M. Young, 'Dispute Settlement in the Uruguay Round: Lawyers Triumph over Diplomats', 29 *The International Lawyer* 2 (1995): 389–409.

60 R. Hudec, 'The Role of the GATT Secretariat', op.cit.p.102.

61 See eg. H. Thompson, 'Reconstruction of International Good Will', 102 *Annals of the American Academy of Policy and Society* 162 (1922), 'World Held in Need of Trade Tribunal', *Washington Post*, (June 11, 1931) at 5 and H. Thompson, 'An international trade tribunal', 34 *ASIL Proceedings* 1(1940): 3–4.

delegates was at odds with such a development. Notwithstanding the final wording of the Chapter, a memorandum on the issue of the ICJ sent by the UK Delegation after the first drafting session of the Charter (London, 1946), captures the idea about law within some key delegations:

'The making of rulings under the Charter should [...], we feel, be the function of the International Trade Organization itself and not of an outside body such as the International Court whose proper function is to determine questions of law and not to appraise economic facts... In almost every conceivable case arising under the Charter, the issues will of their nature involve the element of economic appraisal and assessment and will not be purely legal in character, and it will be impossible to say where economic judgment ends and legal argument begins'.[62]

Nonetheless, it is reasonable to argue that the GATT regime could not have achieved its long term success if a series of innovations from its earliest years had not made it possible to effectively settle disputes between its Contracting Parties. The failed Havana Charter contained a detailed dispute settlement procedure in articles 93, 94 and 95 (Chapter IV).[63] However, acknowledging the uncertainties of the ratification process explained above, the provisions from Chapter IV were reworded in the interim, giving rise to articles XXII and XXIII of the GATT. These two articles provide the legal basis for the progressive construction of a dispute settlement mechanism within the GATT regime. From the very early days, and on the basis of these scant provisions, the GATT diplomats set in motion a series of informal dispute settlement practices which were progressively developed during the first two decades, and finally were codified during the 1973-1979 Tokyo Round.[64] Later on, those codified practices were to become the building blocks for designing the effective and innovative WTO dispute settlement mechanism at the 1986-1994 Uruguay Round.[65] Certainly, the transformation of those minimum provisions into the

62 See E/PC/T/C6/W77 (14 February 1947).

63 For a comment see W. Brown, *The United States and the Restoration of World Trade: An Analysis and Appraisal of ITO Charter and the General Agreement on Tariffs and Trade* (Brookings Institution 1950), pp.227 and subsequent pages.

64 A. Ligustro, *Le controversie tra stati nel diritto del commercio internazionale: del GATT all'OMC* (Cedam 1996) at 94.

65 On the model and preliminary proposals for reform of the mechanism see, in particular, R. Hudec, *Adjudication of International Trade Disputes*, Thames Essay nº16 (Trade Policy Research Centre 1978) and W. Davey, 'Dispute Settlement in GATT', 11 *Fordham International Law Journal* 1 (1987): 51-106.

current WTO dispute settlement mechanism is, paraphrasing Pescatore, 'one of the most remarkable and pragmatic achievements of international law'.[66]

And again, this institutional development was the direct result of joint efforts and experimentation by a small group of GATT insiders. These trade representatives, officials and experts provided the impetus for such a complex endeavor by sharing a global policy vision regarding world trade (as public good). Understandably, for these people, dispute settlement was a prominent item on the agenda from the first meetings of the CONTRACTING PARTIES. The GATT community was fully aware that regime-building required settling disputes within the regime in one way or another, and thus some sort of dispute settlement mechanism had to be developed, even if such a device was to be a highly simplified one, at first.

As a result, the early years of GATT show a low profile and cautious experimentation by some contracting parties and the Secretariat, having embarked on a sustained strategy to develop a dispute settlement mechanism almost from scratch. A series of effective policy moves in the early years, which bear their stamp –and particularly that of Eric Wydham's Secretariat– became key institutional developments in pursuing this objective. As Hudec explains, the people who negotiated the ITO were not prepared to abandon their original legal design easily.[67] The original participants saw themselves as keepers of a flame,[68] and managed to progressively develop their own way of doing things.

As explained, a global epistemic regime had born during the Havana negotiations. The invention of the so-called GATT panels is a significantly defining example, as these are in fact one of the most recognizable institutional features of GATT.[69] The origin of the idea took shape during the early meetings of the CONTRACTING PARTIES. From then on, they gradually became the vehicle to settle disputes within the GATT. In particular, the process began in the first period of sessions in Geneva, when Cuba and the Benelux requested a

66 P. Pescatore, 'Drafting and Analyzing Decisions on Dispute Settlement', *Handbook of WTO/GATT Dispute Settlement*, op.cit.p.7.

67 R. Hudec, 'The Role of the GATT Secretariat', op.cit.p.103.

68 A. Chayes & A. Handler Chayes, *The new sovereignty*, op.cit. p.279.

69 O. Long, *Law and Its Limitations in the GATT Multilateral System* (Martinus Nijhoff 1985), p.77.

qualified opinion from the Chairman of the meeting of the CONTRACTING PARTIES regarding a dispute on discriminatory taxes.[70] Following some consultations, the Chairman proposed a decision, which was adopted without opposition from any of the GATT contracting parties: 'the meeting agreed…';[71] Cuba subsequently withdrew the measure which had led to the dispute. However, the formula of a single adjudicator would be subsequently abandoned, probably foreseeing the complexity of future claims and the concentration of power that such formula could generate. Thus, there was only one other case on Indian taxes on products with export rebates, between India and Pakistan, which would be later settled bilaterally,[72] as India made reservations to the Chairman´s ruling in that second session of the CONTRACTING PARTIES.[73] In this way, working groups began to be used after that session. These working groups would be focused on seeking a 'practical solution'.[74]

Interestingly, embedded in these original practices, conciliation is highly visible throughout the progressive development of the GATT dispute settlement system. The main feature of these ad hoc bodies, composed by representatives of contracting parties, was that the conflicting parties within the working group were also involved in the diplomatic process of finding practical solutions. However, this formula was also soon to reveal its limitations. In this regard, the working group hearing a dispute between France and Brazil on discriminatory internal taxes on imported products, in the second Session, was to remain on the GATT agenda from April 1949 to November 1957.[75] Thus, as the difficulties of a strictly conciliatory model became clear, working groups would soon evolve to more adjudicative forms and mechanics. This institutional development came about with the *Australian Subsidy on Ammonium Sulphate* case:[76] in this case, five state representatives discussed the issues at stake within the working group; however, this time only third parties made the final decision (United States, Norway and the United Kingdom).[77]

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70 See GATT/CP.2/9 (19 July 1948), Appendix A, Item 1.

71 See GATT/CP.2/SR.11 (24 August 1948), p.8.

72 GATT/CP.3/6 (21 February 1948), p.2.

73 See GATT/CP.2/9 (19 July 1948), Appendix A, Item 2.

74 See GATT/CP.4/SR.21 (3 April 1950), p.8.

75 On this interesting case see, in particular, R. Hudec, *The GATT Legal System*, op.cit.p.110-120.

76 See GATT/CP.4/39, *Australian Subsidy on Ammonium Sulphate* (31 March 1950).

77 The Report, drafted by the Secretariat, was adopted by the CONTRACTING PARTIES

This critical development was the turning point for the progressive deploying of a dispute settlement infrastructure within the GATT. As Hudec suggests, the change was so significant that it can only be explained as part of a deliberate plan.[78]

From then on, it would be necessary to wait for the seventh GATT session (1952) to see how this transformation evolved. As the agenda for that session formally included 12 pending cases, the President, the Norwegian Johan Melander, proposed setting up a single working group to resolve them all. The list of possible members for that working group, finally proposed to the CONTRACTING PARTIES by the Secretariat, inaugurated the now traditional 'shortlist' of so-called 'GATT panelists'. It was at that time that the term 'panel' was first formally used by Melander himself to define the new formula; moreover, there were no representatives of major trading powers among the chosen panel members. The emphasis was placed on the technical expertise of those involved with dispute settlement, and thus on reducing power-politics within the procedures. Also the disputing parties did not object to the final proposal delivered by the panel, lending support to the argument that the parties had been consulted beforehand to facilitate dispute settlement regime-building: as Robert Hudec explains, the first step was to propose a single working group; and a few days later, the term 'panel' was slipped in without actually explaining what form it would take. The structure was the same as previous working groups; however, it was agreed that disputing parties would not be allowed to vote, and they were also not permitted to be present when the decision was discussed and finally adopted.[79] The panel's mandate, becoming a short of template for later cases, reads as follows:

'To consider, in consultation with the representatives of the countries directly concerned and of other interested countries, complaints referred to the CONTRACTING PARTIES under Article XXIII and such other complaints as the CONTRACTING PARTIES may expressly refer to the Panel and to submit findings and recommendations to the CONTRACTING PARTIES'.[80]

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on 3 April 1950 and is accompanied by an appendix or memorandum from Australia stating its disagreement.

78 R. Hudec, *The GATT Legal System*, op.cit.p.70.

79 R. Hudec, 'The Role of the GATT Secretariat', op.cit.p.108.

80 See SR7/7 (14 October 1952) and R. Hudec, *The GATT Legal System*, op.cit.p.75.

Rosine Plank provides a detail that highlights the phenomenon: 'the panel procedure was an invention-almost a conspiracy-devised by the secretariat to loosen the hold of the bigger powers which dominated the working parties at that time, and to re-enforce the secretariat's role in guiding and drafting rulings or recommendations to be submitted to the plenary session'.[81] The Executive Secretary declared in a note written in 1955 that 'the primary function of the panel is to prepare an objective analysis for consideration by the contracting parties, in which the special interests of individual governments are subordinated to the basic objective of applying the Agreement impartially and for the benefit of the contracting parties in general'.[82]

The organizational mechanics were relatively simple: the disputing parties explained their arguments to the panel, providing information and documentation in support of their claim; on occasion, this was complemented with information that other interested parties deemed it appropriate to submit. In the following step, the panel drew up a draft report behind closed doors and, as mentioned, excluding the disputing parties. The disputing parties were then given the opportunity to discuss the draft report with panel members, a practice still present in WTO dispute settlement procedures. From then on, the final report was drafted taking into account their positions, and adopted by consensus; thus excluding dissenting opinions. Following this, the report was issued to the CONTRACTING PARTIES for final decision (read approval or dismissal). The GATT Secretariat under the leadership of Wynham White increased its role within these new practices, by drafting documents, organizing meetings, and providing information and documentation to the panel members. Also, according to Robert Hudec's interviews with participants, it was the Secretariat which drew up most of the reports in this first stage of the GATT.[83] From then on, dispute settlement procedures would be subject to gradual formalization, taking shape as a hybrid adjudicative form in no-man's land from the perspective of comparative international law.

Regime-building required subtle experimentation. In this regard, the use of

81 R. Plank, 'An Unofficial Description of How a GATT Panel Works and Does Not', 4 *Journal of International Arbitration* 4 (1987): 55 (emphasis added).

82 R. Plank, 'An Unofficial Description, op.cit.

83 See R. Hudec, 'The Role of the Secretariat', op.cit. p.107, R.Hudec, *The GATT Legal System*, op.cit.p.78 and R. Plank, 'An Unofficial Description', op.cit. pp.74-77.

panels also involved the spatial rearrangement of the room where the differences were addressed. Thus, a strategic and gradual transformation from the debating round table to the 'courtroom' took place, with the panel members and the disputing parties ending seated at separate tables. With this innovation, formal yet imbued with symbolism, the appearance and flavor of judicial practice was incorporated at no political cost. Taking into consideration the traditional difficulties of formally pursuing the creation of any international tribunal, a subtle move of this kind was remarkable; again, as mentioned above, the GATT was under provisional application, and lacked any formal treaty-based organ aside from Article XV (Joint action by the contracting parties).

The contracting parties soon began recognizing the *auctoritas* of the GATT panels. The four reports submitted in the seventh session, for example, required no debate prior to their approval. At this stage, the panelists began to be formally appointed in their role as trade law experts. By taking such step, dispute settlement activities were consensually framed as a professional activity, and thus would soon nurture its own culture and procedures. Dispute settlement was slowly beginning to be drawn towards professional practice, as a means not only of increasing technical refinement but also institutional legitimacy. In fact, when making an assessment of how GATT was operating in the ninth session, several delegates formally voiced their positive opinions in respect of the way the panels were working: the Danish delegate even formally proposed using the panel technique in other areas which had been the province of working groups until that time (ie: import restrictions for balance of payments difficulties); and, in fact, in the next session the Secretariat submitted a report proposing the experimental use of the panel technique in such areas.[84] Nevertheless, the delegations finally agreed to leave things as they were.[85]

This first decade of the GATT regime was a period in which trade diplomats –many of whom were seasoned veterans– governed the day to day operation of the organization in the group spirit arising from the ITO negotiations. The GATT's rather precarious status led them to emphasize a diplomatic

84 See GATT L/392/Rev.1, *Considerations concerning the Extended Use of Panels* (6 October 1955).

85 R. Hudec, *The GATT Legal System*, op.cit.p.81.

approach to dispute settlement. Thus, diplomatic skills were highly appreciated by many GATT practitioners. However, the triumph of the diplomatic approach within the panels during this period would inevitably make their reports rife with ambiguities and generalities. In Hudec's rationalization of this period, given the uncertain perception that awaited the GATT legal obligations in the capitals, it was important not to undermine all the prestige that GATT had gained with decisions that governments might well not be capable of fulfilling. Thus, as this fine scholar explains, the first GATT decisions were generally adjusted to this need for pleasant, smooth and more obscure legal decisions, using the language of diplomacy rather than legal jargon: in his words, the skills laid in suggesting the requisite conclusions by using impressionist brushstrokes which, when closely examined 'never actually stated on paper their real meaning, despite everyone being fully aware of their significance'. By using this technique, it was impossible to reach a satisfactory legal conclusion (at least using normal standards of legal analysis) as to what the decisions really mean or what they actually required.[86] This stage is often characterized by referring to the indecipherable nature of the reports.

Certainly, the impressionist practices of that era raised serious criticism.[87] However, it should also be emphasized that this approach was in all probability the only option open to GATT dispute settlement at that time, given the context in which it found itself in the nineteen fifties, hampered as it was not only by its precarious status but its institutional weaknesses. In this respect, the strategy of GATT diplomats was completely rational, and probably the only means available at the time for keeping the regime on track. In short, at that time, the cryptic, almost artistic nature of those first reports fulfilled a pertinent function at the time, namely, to resolve inter-state disputes *sotto voce*. This pragmatic strategy helped to preserve the unstable institutional structure of the GATT regime from major political tensions, while awaiting better times ahead. Thus, a cooperative and conciliatory atmosphere was at the fore during this period. Curzon depicted this atmosphere by framing the GATT as a club. The discussions within four walls, the attempts at concilia-

86 R. Hudec, 'The Role of the Secretariat', op.cit.p.106.

87 See *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements*. Report to the Committe on Finance, U.S. Senate, On Investigation N°332-212 Under Section 332 (g) of the Tariff Act of 1930, USITC Publication 1793 (December 1985) at 78.

tion rather than head-on conflicts, the private meetings 'to talk things over' were all features of this club-like atmosphere; indeed, the GATT club.[88]

4. The legal barbarians

The club-like atmosphere would have a critical significance for regime-building within GATT, both in the short and long term, as it allowed the incumbents not only to construct common understandings on key issues but also to get comfortably involved in a controlled experimentation which would lay the foundations within the regime for an increased formal use of law, legal procedures and lawyers, with the passing of time. Hudec frames this first period in similar lines by stating that the GATT had to get along with 'whatever low-visibility procedures could be developed consistently with the pretence of not being an organization': 'the GATT would be a 'club', a place where like-minded officials could communicate without having to spell things out in confrontation-producing clarity'.[89] In other words, as Weiler explains, the GATT operatives became a classical network:

'A very dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the "outside" world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships'[90]

Within this context, the dispute settlement mechanism managed to solve more than twenty disputes, functioning regularly until 1963. From then on, however, the panels system fell into disuse from 1964 to 1970. One of the basic reasons was the entry on the scene of the European Economic Community's (EEC) in 1958; and particularly its Common Agricultural Policy and

88 G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement of Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (Michael Joseph Books 1965) at 52-53.

89 R. Hudec. 'The GATT legal system, op.cit.p.635.

90 J.Weiler, 'The rule of law and the ethos of diplomats', *Efficiency, equity and legitimacy: the multilateral trading system at the Millenium* (Brookin Institution Press 2001): 334–336.

preferential trade relations with overseas territories. These policies led EEC members to play the flexibility card within the GATT. Added to this were the trade claims from developing countries, recently incorporated in the GATT, who were demanding more effective access for their exports to the markets of developed countries.[91]Thus, paraphrasing Ernst-Ullrich Petersmann, the decade of the 60s was characterized by the pragmatic attempt to accommodate the GATT 'without undue legalism' to the project of European integration and the new majority of developing countries in the world trading system.[92]

Given this state of affairs, the activity of panels was brought to a halt. However, this situation soon changed, as the increase in non-tariff barriers, which affected the consolidated tariff concessions within GATT, led the US administration to put heavy pressure on its trading partners to open a seventh MTN Round in 1973. The Tokyo Round (1973-1979) intended to address these policy tensions as well as improve some procedural issues in GATT dispute settlement, among other matters. During the Round, the EEC opposed any reform to the dispute settlement mechanism but agreed to its customary practices being codified. As a result, the negotiating parties adopted the so-called 1979 Understanding –consisting of 25 articles in 4 sections regulating notifications, consultations, dispute settlement and the monitoring of compliance– in an Annex under the title 'Agreed Description of the Customary Practice of the GATT'.[93] Interestingly, the provisions of the Understanding were also complemented by multiple special provisions on dispute settlement contained in diverse Tokyo Round Codes, which overshadowed the new rules by fragmenting adjudicative procedures and authorities.[94] In any case, the 1979 Understanding facilitated the return of activity to the panels system.

However, making GATT panels once again a core mechanism of the world trading system would also facilitate a turning point in the GATT regime, as the decade of the 70s veered in the direction of increasingly litigious and le-

91 R. Hudec, 'The Role of the Secretariat', op.cit.pp.108-109.

92 E. Petersmann, *The GATT/WTO*, op.cit.p.84.

93 See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD S26/210 (1980).

94 See *Ministerial Declaration 1982*, Doc BISD S29/9-23 (1983), *Decision of the CONTRACTING PARTIES* Doc BISD 31S/9-10 (1985) Decision of the *GATT Council 1988*, Doc BISD S35/382 (1989) and *Decision of the CONTRACTING PARTIES 1989*, Doc BISD 36/66 and subsequent pages (1989).

galist attitudes, and thus a significant structural change in cultural and institutional terms. There were two basic motives underlying this change of direction. The first of these was a generational takeover of the delegations. As mentioned above, the original delegations had a strong diplomatic focus, given the provisional application of GATT and its original lack of any institutional structures. However, the new generations of delegates had inherited a relatively established 'organization' and therefore their sensibilities were different to those of the old school trade diplomats, particularly in terms of the relative emphasis given to the roles of diplomacy and litigation in the world trading system. In their eyes, rules (read law) should prevail in GATT dispute settlement.

The second motive was the entry on the scene of the United States Trade Representative (USTR): a brand new specialized trade agency in the United States, which assumed the trade policy functions formerly attributed to the Department of State. This new administrative body, from its creation, operated an openly litigious policy within the GATT, and thus developed extremely technical legal arguments, using teams of lawyers for this purpose. Inevitably, the aggressive new policy of the USTR –in which claims were loaded with drawn out baroque style legal arguments and esoteric legal claims–[95]forced the panels to redirect the way in which they approached cases.Attitudes and expectations changed, and the panels felt pushed to amend their well established *lex artis diplomatica*. At the same time, the change forced all counterparts who were in dispute with the USTR to employ similar techniques.[96]

The days of traditional GATT diplomacy were numbered and the legalist approach gradually began to gain credence. Thus, a phase was coming to an end. However, inevitably, the GATT regime was not adapted to the emerging culture; in fact, there were few experts familiar with the technicalities required by this new approach to disputes not only among the state delegates who normally made up the panels, but in the GATT Secretariat as well. In this context, the pressure on the panels system for further technical legal refinement end-

95 R. Hudec, *The GATT Legal System*, op.cit.pp.112-113.

96 For a detailed account and insights on the impact of this US agency in framing the evolution of world trade law and policy since its inception see, in particular, S. Dryden, *Trade Warriors: USTR and the American Crusade for Free Trade* (Oxford University Press 1995).

ed by precipitating a crisis. In essence, the system was unable to withstand the contradicting pressures: the panel members endeavored to reconcile the old and new cultures without success, seeking impossible balances between diplomacy and legalism to keep both sides happy.

The basic feature of the most contentious cases of this period was the questioning of the technical legal quality of reports as well as decision-making procedures within the procedures of the panels. Under the new rules of the 1979 Understanding, disputing parties and the most legally-oriented delegations, in general, tended to play hard against the supposed 'low legal standards' of some reports as well as other procedural decisions of GATT panels. In this context, some controversial cases exacerbated the tensions between the US and European countries, such as the so-called DISC cases on corporate tax practices and export subsidies.[97]In essence, a new culture arose in the GATT with force and momentum. At this stage of regime-building, a new legal culture, winning positions within the GATT claimed that disputes could be best resolved using technical criteria, namely world trade law. The policy vision behind such positioning was constructing an 'expert legal system' within the GATT regime;[98] in other words, building a specialized system of international law.[99]

In the early days of this new phase, John Jackson published *World Trade and the Law of GATT* (1969) with the indicative subtitle 'A legal Analysis of the General Agreement on Tariffs and Trade'.[100] The policy vision contained in this work –informally referred to by many as the GATT 'bible'–sent a strong message across the board for perfecting legal techniques within the world

97 See *United States Tax Legislation* (DISC*), Report of the Panel presented to the Council of Representatives on 12 November 1976*, BISD S23/98 (1977); *Income Tax Practices Maintained by Belgium*, BISD S23/127 (1977); Income Tax Practices Maintained by France, BISD S23/114 (1977); and *Income Tax Practices Maintained by the Netherlands*, BISD S23/114 (1977).

98 For a fine reflection on the need to construct GATT as a 'legal system' (taking the DISC cases as case study) see J. Jackson, 'The jurisprudence of International Trade: The DISC Case in GATT', 72 *American Journal of International Law* (1978): 747–781.

99 See P. Zapatero, 'Modern international law, op.cit.

100 See J. Jackson, *World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade* (The Boobs-Merrills Company Inc 1969).

trading system in order to upgrade its institutional efficiencies.[101] The stance taken by this fine academic was highly visible and influential in GATT circles, helping to legitimize policy change towards the so-called 'rule-based approach'. As David Kennedy recalls, 'it was Jackson who largely invented the field [of trade law], transforming his experiences with the United Trade Representative's office from a narrowing regulatory specialty into a recognized subject of legal study'.[102] The policy vision coined within that monograph as the 'rule-based approach' was to later expand into multiple influential academic articles, and it was finally to become mainstreamed in GATT lingua two decades later with the help of *The World Trading System: Law and Policy of International Economic Relations* (1989),[103] published right in the middle of the Uruguay Round Negotiations (1986-1994).

The emerging new culture of the world trading system required different expertise and technologies. The GATT was changing, and not only from within the delegations but from within the Secretariat itself. Thus, when the Swiss Arthur Dunkel (1980-1993) succeeded Olivier Long (1968-1980) as Director of the GATT Secretariat, a final blow was dealt to the embattled old and new cultures. Indeed, Olivier Long was the last great proponent of the diplomatic approach within the Secretariat. In fact, it was he who proposed the idea of legally-controlled pragmatism in his *Law and its Limitations in the GATT Multilateral Trade System* (1985): according to the former Director General, 'the General Agreement offers many possibilities for a legally controlled pragmatism, and throughout the history of GATT, contracting parties have responded constructively and positively to international economic and political conditions, without having undue regard to legal technicalities'.[104] How-

101 For his current approach to world trade law after the inception of WTO see J. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press 2000) as well as, in particular, J. Jackson, *Sovereignty, the WTO, and the Changing fundamentals of international law* (Cambridge University Press 2006).

102 See D.Kennedy, 'The international style in postwar law and policy: John Jackson and the field of international economic law', 2 *American Journal of International Law and Policy* 10 (1995): 672.

103 J. Jackson, *World Trading System: Law and Policy of International Economic Relations* (The MIT Press 1989).

104 O. Long, *Law and its Limitations in the GATT Multilateral Trade System* (Martinus Nijhoff 1985) at 35 –36 and 62.

ever, a new era had begun. The diplomatic approach –which was the direct legacy of those who had negotiated the Havana Charter and kept the GATT afloat during its early years– was now also withdrawing from the Secretariat. In fact, Dunkel was to promote, not without some hardship, the creation of a legal service within the Secretariat itself; the new Director General's aim was to guarantee against any 'legal errors' made by the panels, by assisting them in improving quality and technical accuracy of their decisions.[105]

The increase in the legal quality of the panel reports in the eighties was definitely attributable to this initiative. From then on, the GATT had fairly well structured procedures in place (the 79 Understanding and other Tokyo Codes) and a growing number of delegates and experts were in favor of upgrading the position of legal rules in dispute settlement activities. Therefore, in order to close the circle of rule-based adjudication, the last big pitfall to avoid was the so-called 'positive consensus': the requirement for panels to be established as well as panel reports to be adopted by consensus at the GATT General Council. As a result, any contracting party could block the establishment of a panel or the adoption of a given report. Thus, the functioning of panels could be easily obstructed. For decades, the 'positive consensus' was entrenched in both culture and practices of the old trade diplomats, as a rational way of securing the survival of an originally weak GATT under provisional application.[106] However, new militancies and interests achieved reforms that hitherto would have been unthinkable. In essence, the GATT Contracting Parties were fully aware of the benefits to be gained by generally honoring the rules of the game contained in world trade law. At the same time, the growing *auctoritas* of panels –as a result of their increased legal expertise– helped to pursue a stronger rule-based policy approach which would close the circle of world trade law.

These developments, together with the pressure of US trade unilateralism,[107] led the GATT Contracting Parties to finally eliminate the 'positive consensus' rule from the provisions of the new WTO Dispute Settlement Understanding

105 R. Hudec, 'The Role of the Secretariat' op.cit. pp.114–115.

106 See *Review of the Effectiveness*, op.cit.p.79.

107 See in particular R. Hudec, 'Thinking about the New Section 301: Beyond Good and Evil', *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* (University of Michigan Press 1990) at 113-159.

under negotiation during the Uruguay Round. Paradoxically, in this regard, such change towards automatic and fully binding legal adjudication within the world trading system came about partly as a result of trade unilateralism. During the Uruguay Round, the USTR managed to obtain a mandate from the US Congress to combat outside GATT procedures the supposed 'unfair' practices of other contracting parties. From its earliest days, the world trading system has traditionally functioned in line with US trade legislation.[108]In this case, US unilateralism was seeking more market access but also a more effective dispute settlement mechanism, which was already in the negotiating mandate of the Uruguay Round. Leaving aside the dubious international legality of such unilateral practices, the strategy paradoxically paid off for regime-building, as less powerful countries saw the strengthening of the dispute settlement mechanism as a means of helping to restrain US unilateralism: ironically, the law of the jungle pursued through the so-called US Section 301 and Super 301 promoted the consolidation of the rule of law in multilateral trade relations. Indeed, regime-building in this area would not have taken place probably without it. In fact, Arthur Dunkel is generally attributed with saying that this piece of domestic legislation was the best thing that ever happened to the GATT.[109]

5. A hard-law status

To paraphrase Pescatore, the panel system has managed to produce useful reasoned legal solutions to the often thorny inter-state tensions regarding world trade.[110]The history of the invention of the GATT *panels* evidences the importance of the 'human factor' in regime-building generally. As mentioned, the negotiations of the Havana Charter laid the foundations for a small global epistemic community, highly specialized in nature, with its own and increasingly complex practices as well as cultural references and values. In essence, the GATT people basically kept the flame of the world trading regime alive, against all odds, for more than half a century. Being aware of this phenomenon allows a better understanding of how the GATT has gone from a totally

108 G. Curzon & V. Curzon, 'GATT: "Traders´ Club"', *The Anatomy of Influence. Decision Making in International Organization* (Yale University Press 1974) at 313.

109 J. Bhagwati, 'The Diminished Giant Syndrome', 72 *Foreign Affairs* 2 (1993): 22–26.

110 P. Pescatore, 'The GATT Dispute Settlement Mechanism', op.cit.p.35.

provisional and anemic trade agreement to a highly powerful, efficient and sophisticated global regime under the form of WTO.

The invention of GATT *panels* has a starring role in the process, as these had a resounding long term success by allowing settling and/or mitigating multiple trade disputes within the four corners of the GATT. In doing so, the availability of panels helped not only to reduce trade tensions but also made it easier for the GATT community to advance a common rulemaking agenda in the medium and long term. As a result, the progressive development of the panels system culminated in the incorporation of a brand new and unprecedented dispute settlement mechanism in the Final Act of the Uruguay Round. To paraphrase Silvia Ostry, this mechanism is 'the strongest dispute settlement mechanism in the history of international law'.[111] The negotiations for the instrument began when 92 Contracting Parties would formally adopt the Punta del Este Declaration which formally opened negotiations of the Uruguay Round (20 September 1986);[112] among the 14 negotiating groups, one was concerned exclusively with the dispute settlement mechanism.[113]

The Final Act incorporating the results of the Round, signed on 15 April 1994, is the most successful of all MTNs held to date. Its advances regarding new disciplines and coverage as well as the creation of the WTO are presided over by the Dispute Settlement Understanding (DSU); a highly technical instrument that amply exceeded the expectations of the negotiators by incorporating key innovations: mainly, (1) the elimination of the positive consensus, (2) the integration of procedures and (3) the establishment of a permanent Appellate Body. These changes have been a large step forward in the strengthening of world trade governance.

The dispute settlement mechanism today is, to paraphrase the first WTO Director General, the heart of the WTO system.[114] In almost two decades since its inception, the new mechanism has gained a structural position in global

111 S. Ostry, 'The Uruguay Round North-South Grand Bargain: Implications for future negotiations', *The political economy of international trade law: Essays in honor of Robert. E. Hudec* (Cambridge University Press 2002) at 287

112 Doc GATT/1396 (25 September 1986).

113 T. Steward & C. Callahan, *The GATT Uruguay Round: A Negotiating History (1986-1992), Dispute Settlement Mechanism* (Kluwer Law and Taxation Publishers 1993).

114 *WTO Focus. Newsletter*, August-September (1996) at 7.

governance by producing highly technical legal decisions, which are adopted by the WTO General Council –formally acting as Dispute Settlement Body– almost automatically. Interestingly, however, one critical issue remained somewhat vague in the wording of the Understanding, namely the compulsory nature of the reports. Under the GATT of 47, the requirement for positive consensus could leave reports in a legal limbo if at least one of the contracting parties did not agree with adopting the report.[115] On the contrary, under WTO law, panel and Appellate Body reports are to be adopted unless the Dispute Settlement Body decides not to do so by consensus. Hence, the requirement has been subtly reversed, from positive... to negative consensus.[116] In other words, as Komuro puts it, non-adoption of reports has turned into a mere intellectual curiosity.[117] In short, adoption of reports is *de facto* automatic.

Notwithstanding the above, some legal literature questioned the compulsory nature of reports right after the adoption of the Final Act of the Uruguay Round. For example, US academics writing in legal journals such as the influential American Journal of International Law (AJIL) contended that the Understanding permits a generalized option of either compliance or compensation.[118] These positions were strongly contested with celerity in that same journal by John Jackson himself, who argued that there is certainly a WTO legal obligation to comply with the reports, as well as that compensation, is as mere fallback in the event of non-compliance.[119] Obviously, whether or not this is legally so was a capital question for the nascent WTO regime, and therefore its

115 J. Jackson, 'The World Trade Organization, op.cit.p.87.

116 See article 16.4 and 17.14 of the Understanding. The literature uses various terms to refer to this amendment: 'negative consensus', 'reverse consensus', etc.

117 N. Komuro, 'The WTO Dispute Settlement Mechanism. Coverage and Procedures of the WTO Understanding' 29 *Journal of World Trade* 4 (1994): 41.

118 J. Bello, 'The WTO Dispute Settlement Understanding: Less is more', 90 *American Journal of International Law* 4 (1996): 416 and subsequent pages and J. Bello & A. Holmer, 'Dispute Resolution in the World Trade Organization Concerns and Net Benefits', 28 *International Lawyer* 4 (1994): 1103 (compensation as an option for replacing compliance).

119 J. Jackson, 'The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of a Legal Obligation", 91 *American Journal of International Law* 1 (1997): 60-61. For further criticism on the editorial comments of Judith Bello see Roessler's view, as former Director of the GATT Legal Affairs Division, in F. Roessler, 'Comments: Performance of the System IV: Implementation', 32 *International Lawyer* (1998): 789-790.

most recognizable academic expressed himself in an unflinching and categorical manner.[120] According to Jackson, framing the reports as mere recommendations is a misunderstanding, as the practice of the original GATT contracting parties assumes that there was an obligation to comply with the terms of panel reports.[121] His words in the editorial comment written for the occasion –under the illustrative title 'The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation'– are the following:

'So what does the DSU language itself say? Here we can examine a good number of clauses, and I would suggest that the overall list of those clauses, in the light of the practice of GATT, and perhaps supplemented by the preparatory work of the negotiators (unfortunately not well documented), strongly suggests that the legal effect of an adopted panel report' is the international law obligation to perform the recommendation of the panel report'.[122]

In consequence, the obligation to comply is basically derived from several articles of the understanding (namely, articles 3.7, 19.1, 21.6, 22.8 and 26.b):[123]

'Thus, the DSU clearly establishes a preference for an obligation to perform the recommendation; notes that the matter shall be kept under surveillance until performance has occurred; indicates that compensation shall be resorted to only if the immediate withdrawal of the measure is impracticable; and provides that in non-violation cases, there is no obligation to withdraw an offending measure, which strongly implies that in cases of violation there is an obligation to perform'.[124]

Notwithstanding these fine arguments, the text of the understanding does not allude in any way to the binding nature of the reports; and Jackson himself recognizes this fact: '[w]hat can we say about the new DSU? Unfortunately, the language of the DSU does not solidly "nail down" this issue'; and the scholar later adds:

120 It should be emphasized in any case that compensation in place of compliance is expressly provided for in the specific case of non-violation complaints of GATT Article XXIII.b. See Article 26.1.d of the DSU.

121 J. Jackson, *The World Trade Organization*, op.cit.p.83.

122 J. Jackson, 'The WTO Dispute Settlement, op.cit.p.62-63.

123 In a later text, Jackson reinforces his argument adding new provisions to the list (article 3.4, 3.5, 3.7, 11, 19.1, 21.1, 21.6, 22.1, 22.2, 22.8 y 26.1b). See J. Jackson, *The World Trade Organization*, op.cit.p.87, note 82. <o}

124 See J. Jackson, 'The WTO Dispute Settlement Understanding-Misunderstandings', op.cit.p.62.

'Oddly enough, some diplomats who assisted in the negotiation of the DSU told me that they thought they had nailed it down'.[125]

The literal meaning of provisions such as Article 19 (under the heading 'Panel and Appellate Body Recommendations'), for example, are crystal clear: in principle, reports contain recommendations. However, the established practice has confirmed that such recommendations became binding decisions once they had been adopted by the General Council acting as Dispute Settlement Body (DSB). In practice, the originally debatable nature of panel and Appellate Body reports has been closed in favor of their binding nature, once these have been adopted by the DSB.[126] Hence, at the end of the day, the mechanics of international customary law came to the rescue of WTO regime-building for the occasion.

In fact, international legal literature is currently pacific regarding the binding nature of reports adopted by the DSB.[127] Today, the highly consolidated interplay between practice and *opinio iuris* on this issue allows WTO Members to frame DSB adopted reports as legally binding. However, any person unfamiliar with these intricacies (including lawyers) would have serious difficulties in understanding this development, as she/he could always read the word 'recommendation' in the legal texts. Hence, it would certainly have been desirable for the Understanding to nail down such a critical issue, provided that binding nature appeared to be the intention of the negotiators.

In any case, after decades of consensual practices within the panels system, the negotiating working group on dispute settlement in the Uruguay Round (presided over by Julio Lacarte-Muró) managed to go far beyond this by completing the drafting of the WTO Dispute Settlement Understanding.[128]

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125 Ibid: 62.

126 See Article 20 of the DSU (Time-frame for DSB Decisions)

127 See, for example, R. Hudec, 'Broadening the Scope of Remedies in the WTO Dispute Settlement', *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals,* (Cameron May 2000) at 345-376 or A. Sykes, 'The Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding: Damages or Specific Performance?' *New Directions in International Economic Law: Essays in Honor of John H. Jackson* (Kluwer Law International 2000) at 347-51.

128 T. Stewart & C. Callahan, The GATT Uruguay Round: A Negotiating History (1986-

To paraphrase Shell, the new system represented a resounding victory for the legalists in the debate over the dispute settlement model for multilateral trade.[129] In fact, as a result of that, nowadays, the transition from the GATT to the WTO is seen by many observers as a full shift from soft-law to hard-law. For Abbott, for example, evidence of this trend is clearly perceptible in two areas: 'The first area is progressive refinement of the rules from the general to the specific. The second is the transformation from a system for resolving differences to one based on a quasi-judicial system of consensus'.[130]

Today, the functioning of panels and the Appellate Body is governed by strict application of WTO law. The strong diplomatic approach of some panels from the GATT era has been left behind. The legal approach has won over those critics identifying law and legal institutions with rigidity and inflexibility and, in consequence, as tools unsuitable for the institutional specificities of progressive trade liberalization.[131] In the early years of the diplomatic approach, as Jackson recalls, the GATT was merely a 'negotiating forum' designed substantially to retain a balance of concessions and advantages between the Contracting Parties.[132] Nowadays, the world trading system builds upon such forum to go beyond, by establishing a dynamic regulatory forum which rules are justiciable in practice.

However some elements of the diplomatic approach still continue to hold sway when resolving disputes. In fact, some remain in the current provisions of the Dispute Settlement Understanding itself. Thus, even though today the mechanism is hyper-formalized, it preserves some diplomatic elements that pay tribute to the tradition and old-school culture of world trade diplomacy. In this way, the DSU maintains diplomatic elements which are considered

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1992). Dispute Settlement Mechanism (Kluwer Law and Taxation Publishers 1993).

129 R. Shell, 'Trade legalism, op.cit.p.833.

130 F. Abbott, 'Incomplete Rule Systems, System Incompatibilities and Suboptimal Solutions: Changing the Dynamic of Dispute Settlement and Avoidance in Trade Relations Between Japan and the United States', 16 *Arizona Journal of International and Comparative Law* (1999): 195-196.

131 In defence of this perception see, specially, O. Long, *Law and its Limitations*, op.cit.p.21 and 73 and K. Dam, *The GATT Law*, op.cit.p.358.

132 J. Jackson, *The World Trading System: Law and Policy of international economic relations* (MIT Press 1997) at 93.

useful.[133]For example, the terms of reference for panels are defined by bilateral negotiation. At the same time, the parties engage in a re-examination phase prior to obtain a final decision on the cases. Also the DSU still contains the old GATT provisions relating to obtaining a 'mutually acceptable' solution as well as the maintenance of a 'balance of rights and obligations'. These elements, as Pescatore suggests, are very close to conciliation.[134] In this regard, conciliation was the privileged mode of resolving disputes in the world trading system in the pre-WTO phase,[135] and that culture certainly did not vanished in the WTO legal texts. In consequence, several formulas related to conciliation have been retained.[136] In short, regime-building in the area of dispute settlement advanced towards hyper-legalism without dispensing with at least some functional elements of its diplomatic inheritance.

Today, the WTO dispute settlement mechanism is not strictly speaking a judicial instrument, given that it comprises a number of *ad hoc* bodies together with one permanent body –panels and Appellate Body respectively– the reports of which require, as explained, approval by the DSB. In this regard, although the establishment of panels and the approval of reports is now automatic in practice –rejection requiring collective negative consensus–, both decisions still require adoption by the General Council, acting as DSB. However, the Appellate Body has imprinted a strong judicial orientation in its procedures and rulings since the very first case was appealed in 1995. Thus, there is a wide consensus among world trade experts on the judicialization of world trade dispute settlement.[137] As a result, the policy space for diplomacy/negotiation under such terms is not only inside but outside the mechanism, as WTO dispute settlement functions by default. Therefore, it would be reasonable to

133 Evidently, this is not exclusive of the WTO. On this, see in particular M. Shapiro, *Courts: A Comparative and Institutional Analysis* (University of Chicago Press 1981) at 8 and 15.

134 P. Pescatore, 'The GATT Dispute Settlement Mechanism', op.cit.pp.37-38. <o}

135 E. Canal Forgues, *L'Institution de la conciliation dans le cadre du GATT: Contributions a l'etude de la structuration d'une mecanisme de reglement des differends* (Bruylant 1993).

136 See E. Canal Forgues, 'Le système de règlemend des différends de l'OMC', *La réorganisation mondiale des échanges* (Pedone 1996) at 285.

137 For some first reflections on this issue with regard to the GATT regime, see G. Malinverni, *Les Reglements des differends dans les organisations internacionales economiques,* (IHHEI 1974) at 171.

argue that diplomacy was not annulled but transformed by the current rule-based approach into rule-based diplomacy. That is, in practice, WTO rules and decisions have become quite strong arguments in all bilateral trade relations nowadays, as the long shadow of the WTO dispute settlement mechanism facilitates finding mutually acceptable solutions and arrangements.

3

Trade Rounds as public-private regulatory partnerships

1. Lobbying in services liberalization

The General Agreement on Trade in Services (GATS) is one of the key instruments added to the world trading system in the complex negotiations of the Uruguay Round. As a result of multi-issue negotiations of the last GATT Round, the GATS was incorporated in Annex 1B of the WTO agreement, together with other substantive agreements. Designed to improve multilateral access of foreign services providers to domestic markets, the GATS has become one of the key agreements (together with TRIPS) expanding the scope of the world trading system beyond traditional disciplines. Along with the substantive provisions of its text, GATS Annexes incorporate national schedules in which WTO Members consign liberalization commitments in multiple areas (transport, construction, education, telecommunications, energy, accountancy, legal services, engineering, tourism, etc). The only services excluded from these schedules are 'services supplied in the exercise of governmental authority' (article I.3 of the GATS).[1]

Trade in services is an important and growing contribution to all advanced economies. Nowadays, the global supply of services is burgeoning; trade in services accounts for more than 20% of world trade, and figures are steadily increasing.[2] The services sector is also the major contributor to economic growth and employment in developed countries. In the European Union, for example, the services sector generates at least two thirds of the GDP

1 See P. Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (Oxford University Press 2007) and J. Van de Gronden (*et al.*), *EU and WTO Law on Services: Limits to the realization of General Interest Policies within the Services Markets?* (Kluwer Law International 2009).

2 See 'Trade in commercial services', *WTO International Trade Statistics 2013*, Chapter III (WTO publications 2013) at 143.

and employment.[3] Currently, the EU-28 reports surpluses in service transactions of more than 100.000 million Euros with the rest of the world.[4] In addition, the service sector in emerging economies has gone beyond merely providing an extra market niche for foreign services providers; companies from E7 economies (China, Russia, India, Indonesia, Mexico, Brazil, South Korea and Turkey) are significantly increasing their stake in the global supply of services.[5]

As a result, the services industry incorporated in developed and emerging economies is putting pressure on state representatives to improve market access in such a strategic sector. To achieve this end, a number of business platforms, networks and associations influence the negotiating positions of trade representatives and delegates in multiple global negotiations, by providing expert knowledge and identifying market niches. Business coalitions such as the United States Coalition of Services Industries (USCSI), the European Services Forum (ESF), or the Global Services Coalition are illustrative examples of how the industry collaborates with trade representatives within these processes. These are examples of long term trends. In fact, the GATS itself owes its existence to a seminal strategy pursued by the USCSI in the 80s. This industry coalition was created in 1981 by the managing directors of AIG, American Express and Citicorp to launch a powerful campaign for incorporating services to the GATT liberalization agenda for the Uruguay Round.[6] As explained by the first President and founder of the USCSI, Harry Freeman, the idea began to take shape at the end of the nineteen seventies when American Express' expansion strategy came up against

3 See, in particular, *A partnership for new growth in services 2012-2015'*, European Commission Communication (8 June 2012).

4 See *International Trade in Services: Trade in services 2006 and 2011*, Eurostat (Data from August 2012).

5 See *Services Trade Balance: Export minus import of services 2012/1*, OECD Factbook Statistics (8 January 2013).

6 For the central role of American Express see, in particular, D. Yoffie, 'Trade in Services and American Express', *International Trade and Competition: Cases and Notes in Strategy and Management* (McGraw-Hill 1990) at 367–386. For a detailed history of GATS see G. Feketekuty, 'Assessing and Improving the Architecture of GATS', *GATS 2000, New Directions in Services Trade Liberalization* (Brookings-Wharton Papers on Financial Services 2000) at 85–111 and J. Marchetti and P. Mavroidis, *The Genesis of the GATS (General Agreement on Trade in Services,* 22 EJIL (2011): 689–721.

barriers to market access in over thirty countries and began to enlist public support in this regard.[7]

According to this former President of the USCSI, the services industry soon foresaw the regulatory potential of the GATT to open services markets. However, services liberalization had to be first incorporated in GATT MTN rounds, which were traditionally focused on trade in goods. In order to make such a project possible, the Managing Director of American Express joined forces with the heads of Citicorp and AIG to found the USCSI, opening offices in Washington, New York, Brussels and Tokyo.[8] The coalition lobbied the US government and congressmen, attended congressional hearings and funded events and campaigns on the benefits for the US economy of regulating global trade in services; for example, media companies still using the term 'trade in goods' were contacted to point out that trade is also 'trade in services' and asked to correct the 'error' in future. It was unusual to link trade with services, and even terms such as 'financial services' had still not been coined at that time. In any case, the USCSI managed to consolidate the term and thus the new idea of 'trade in goods *and services*' in public opinion.[9]

Finally, an initiative regarding trade in services was on board the GATT at the end of 1982; in the Ministerial Decision of November 1982, GATT Contracting Parties agreed to elaborate studies on the role and evolution of services in their economies, aiming to evaluate the possible incorporation of services in a new round of trade negotiations.[10] Four years later, the Ministerial Conference launched the Uruguay Round (Punta del Este, 1986) including a negotiating group on services (Ministerial Declaration of September 1986). USCSI members not only attended all the ministerial meetings leading to this launch (1982, 1984 and 1986); from then on, this business coalition actively collaborated with US negotiators, and helped to shape the negotiating strategy of the USTR (United States Trade Representatives) throughout the whole Uruguay Round.

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7 H. Freeman, *Financial Services and the GATS 2000 Round* (Brookings-Wharton Papers on Financial Services 2000) at 454-461 and H. Freeman, 'The Services Sector: Yesterday, Today and Tomorrow', *Economic Perspectives* 1(1996): 19–21.

8 H. Freeman, *Financial Services,* op.cit.p.456.

9 Ibid: p.457.

10 See *GATT Ministerial Level Ministerial Declaration adopted on 29 November 1982*, L/5424 (29 November 1982).

2. Blurring the general and special interest

By the time the Round ended, the USCSI had approximately 400 people on its payroll.[11] Thus, the GATS is to a great extent a by-product of a successful public-private regulatory partnership. By producing a whole multilateral regulatory framework, this public-private partnership is an illustrative case study of how the allocation of resources to lobbying can advance special interest in international legislation.

A similar lobbying model was subsequently applied by the banking industry to liberalize world financial services after the Uruguay Round. As the round failed to successfully complete the negotiations for an agreement on financial services, and a further endeavor in this area also failed in WTO later on, the US and EU representatives gave a greater role to the financial industry in subsequent negotiating processes. In this case, the CEOs of Barclays Bank and Ford Financial Services, Andrew Buxton and Ken Whipple respectively, were invited to set up a high level 'transatlantic' group that would work to define joint strategies in the field.[12] The Financial Leaders Group was formed in 1996 as a result, comprising chairmen and CEOS of major financial services companies (banks and insurers in the main). Their formal and informal recommendations guided the positions of negotiators and contributed to finally creating the WTO Financial Services Agreement in 1997.[13]

The public-private regulatory partnerships employed by the USTR during the Uruguay Round also provided a model for European trade representatives to upgrade the market access strategies of the EU. Following the negotiations of the Financial Services Agreement, the Commission´s Directorate General for Trade adopted a similar model for its own consultations with the services industry in 1998. In fact, the Commissioner Leon Brittan publicly recommended the set up of a European special interest group for services and proposed Andrew Buxton –a lynch pin of the Financial Leaders Group– to organize. The objective of this European business platform was to provide technical

11 H. Freeman, *Financial Services,* op.cit.456.

12 See A. Buxton, 'Presentation speech', *Preparatory Conference for the World Services Congress*, Washington DC (2 June 1999).

13 M. Kono, *Opening markets in financial services and the role of GATS* (WTO 1997) and W. Dobson & P. Jacquet, *Financial services liberalization in the WTO* (IIE 1998).

assistance to European negotiators in preparing the so-called GATS 2000 negotiations.[14]

This initiative led to the creation of the European Services Network, which that same year saw the setting up the European Services Forum (ESF), based at the European Employers' association UNICE in Brussels. The platform was presented at an event sponsored by the Directorate General for Trade, on 26 January 1999.[15] In his inaugural speech, Brittan publicly offered to refine and develop the European negotiating strategy, working with the industry to define preferences and goals. Nowadays, ESF is a firmly established institution, providing a link between European negotiators and the European services industry. Among other activities, this business platform follows up the development of liberalization requests and offers from the European Union in a variety of forums.[16]

The British Committee for Liberalization of Trade in Services (LOTIS) –which answers to the IFSL (International Financial Services London) – is also a critical business platform playing a significant role in this regard. Inspired by the Financial Leaders Group mentioned above, at the time it provided a sophisticated model of coordination between industry and trade negotiators. Under its hybrid structure, a limited group of high-level government and business representatives work jointly, share information and assess and deliberate on strategies for international negotiations in progress.

Unsurprisingly, the non-inclusive nature of these public-private partnerships is often questioned by activists and observers alike. In fact, the leaking of the minutes and records of the LOTIS High-Level Group from April 1999 to February 2001 was roundly criticised when it was discovered that a dozen meetings of European negotiators had been held behind closed doors with major EU as well as US companies (e.g. Morgan Stanley, PwC and Prudential Corporation).[17]

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14 See A. Buxton, 'Presentation Speech', op.cit.

15 See L. Brittan, 'European Service Leaders' Group', *Speech at the launching meeting of the European Services Forum* (26 January 1999).

16 See generally, J. Greenwood, *Interest Representation in the EU* (Palgrave Macmillan 2003) and C. Gerlach, 'Does Business really run EU trade policy? Observations about EU trade policy Lobbying', 26 *Politics* 3 (2006): 176–183.

17 The texts of the minutes, which for a while were published on the official IFSL web-

The position of the industry often permeates current global rulemaking as a result of such policy visions and partnerships. During the 10th anniversary of the WTO, to cite one example, the Director General Supachai Panitchpakdi addressed the following message to the CEOs of the US services industry: 'we need consistent pressure coming from the private-sector side. We need governments who understand what kind of interests you have in the Round'.[18] In addition, Commissioner Leon Brittan succeeded Andrew Buxton as Chairman of the LOTIS Committee of International Financial Services London (IFSL) after laying aside his public duties in 2001.[19] In short, these public-private regulatory partnerships open up a new dimension in traditional business lobbying, by placing global business lobbying at the heart of international lawmaking in the so-called 'economic' areas.

3. Restructuring public services

The global liberalization of services is not free from challenges for many observers. For example, one concern raised by the GATS is that, by virtue of functioning as a dynamic regulatory framework, it lays the foundations for the services industry to gradually work its way into publicly provided services.[20] In principle, the GATS excludes from its disciplines those 'services supplied in the exercise of governmental authority' (article I.3.b).[21] This general exception cuts across all sectors and is designed to cover essential governmental functions.[22] The wording of the agreement defines these services

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site may be consulted at the *Transnational Institute* and *Corporate Europe Observatory* in www.gatswatch.org.

18 S. Panitchpakdi, 'The WTO After 10 Years: The Lessons Learned and The Challenges Ahead' *Council of Foreign Relations,* Nueva York (10 March 2005).

19 See 'Lord Brittan to Chair City's Trade Liberalisation Group', *IFSL press release* (7 February 2001).

20 See eg. Ch. Scherer, 'GATS: long-term strategy for the commodification of education', 12 *Review of International Political Economy* 3 (2005): 484–510.

21 Excluded sectors, in addition to services provided in the exercise of governmental authority, include the air transport sector, air traffic rights and their related services.

22 M. Krajewski, 'Protecting a Shared Value of the Union in a Globalized World: Services of General Economic Interest and External Trade', *EU and WTO Law on Services: Limits to the realization of General Interest Policies within the Services Markets?* (Kluwer Law International 2009) at 212–213.

as those supplied 'neither *on a commercial basis* nor *in competition* with one or more service suppliers' (article I.3.c). In other words, the legal definition of these services is not based on their nature but on their mode of supply (those services not supplied in market conditions). For GATS advocates, the possibility of providing services 'in the exercise of government authority' in any given sector does not detract from the fact that private and publicly provided services are both present in this sector. Nevertheless, as Adlung explains, if we interpret the term 'on a commercial basis' or 'in competition' with other service suppliers in the sense of 'in coexistence' or 'potential replacement', the general exception of article I.3.b would largely lack substance.[23] Thus, for example, what does payment or joint payment in a public service imply for GATS disciplines?

Nowadays, it is hard to find sectors in which private and publicly provided services do not coexist. Therefore, it is always possible to interpret that most publicly provided services could be excluded from being characterized as 'governmental' if specific commitments are made in the national schedules. In GATS technical terms, the introduction of profitability or competitiveness in a publicly provided service originally operating as a non-profit public monopoly could probably deprive it of the status of 'services supplied in the exercise of governmental authority'.[24] These are some of the reasons why the critical literature on the GATS refers to the establishment of a world 'neoliberal concept of public services'.[25] This also explains in part why some trade representatives are being particularly cautious in consigning commitments within the GATS framework. In this regard, commitments in the national schedules have remained below the initial expectations; in fact, it has been suggested that WTO Members should come to an arrangement to clarify the GATS rules on the exclusion of governmental services, in order to facilitate the commitments to be made.[26]

On the other hand, almost all public administrations include the private sup-

23 R. Adlung, 'Public Services and the GATS', 9 *Journal of International Economic Law* 2 (2006): 464–465.

24 M. Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework', 6 *Journal of International Economic Law* 2 (2003): 358.

25 M. Krajewski, 'Public Services', op.cit.p.359.

26 R. Adlung, 'Public Services, op.cit.p.469.

ply of *public services* to a greater or lesser degree. In fact, many public administration activities are carried out through *mixed supply of services,* combining public and private components through public procurement. As a result, the legal margins available to countries within the scope of the GATS schedules become blurred: in practice, the majority of publicly provided services at the present time are likely to be provided in commercial conditions, and in competition with other suppliers. In addition, publicly provided services are not generally excluded from liberalization requests and offers. In this regard, the GATS rules fully apply once a liberalization commitment is incorporated in the national schedule of a WTO Member, unless the respective columns of its schedule consign limitations to market access or national treatment. Thus, any specific commitments in sensitive sectors such as health or education, for example, should be defined with special care.[27] For example, a liberalization commitment may be consigned uniquely covering 'services supplied by private companies' for processing and distribution of water. In this way, publicly provided services for processing and distribution of water would be excluded from GATS rules. However, this commitment may well also be consigned with little precaution.

In principle, the 'top down' strategy embedded within the GATS for consigning liberalization commitments, offers sufficient regulatory space and flexibility to ensure direct governmental provision of public services.[28] However, Part IV of the GATS is entitled 'progressive liberalization' for a reason: the GATS functions as a regulatory framework promoting long term progressive liberalization in all categories of services. In short, this regulatory framework was designed to gradually cover all classifications of services sectors and subsectors within the UN Central Product Classifications (CPC).[29] In this context,

27 On GATS and health services see, in particular, P. Delimatsis, 'GATS and Public Health Care: An Uneasy Relationship', *TILEC Discussion Paper No. 2012–005* (February 9, 2012) and D. Legge, D. Sanders & D. McCoy, 'Trade and health: the need for a political economic analysis', *The Lancet*, Volume 373, Issue 9663 (14–20 February 2009): 527–529. With regard to GATS and educational services also see A. Verger, *WTO/GATS and the Global Politics of Higher Education* (Routledge 2010) as well as A. Verger, 'The Merchants of Education: Global Politics and the Uneven Education Liberalization Process within the WTO', 53 *Comparative Education Review* 3 (2009): 379–401.

28 M. Krajewski, 'Public Services', op.cit.p.361.

29 See WTO MTN.GNS/W/120, *Services Sectoral Classification List*, Note by the Secretariat (10 July 1991).

a collective negotiating strategy to expand the scope of the commitments in educational services has been underway for over a decade. Thus, during the first post-WTO service negotiations (GATS 2000 negotiations), the so-called 'Friends of Education' group (WTO Members interested in promoting liberalization in the education sector) presented its first request for liberalization of private education services to 22 WTO Members,[30] and made this request into a liberalization offer on their part.[31] In short, industry pressure to regularly improve market access in these and other service sectors is likely to be sustained within the GATS negotiating framework.

4. Disciplining of domestic regulation

For many, the GATS negotiations potentially cover any domestic measure that could restrict access to the services market. As Renato Ruggiero explained when he was Director General of the WTO, 'the GATS provides guarantees over a much wider field of regulation and law than the GATT; the right of establishment and the obligation to treat foreign services suppliers fairly and objectively in all relevant areas of domestic regulation *extend the reach of the Agreement into areas never before recognized as trade policy*'.[32] From its incipience, the GATS has always raised doubts over the margins granted to domestic regulation. In fact, efforts were made to dispel some of these doubts in its Preamble by formally recognizing the so-called 'right to regulate':

'*Recognizing the right of Members to regulate, and to introduce new regulations,* on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right'.

Nevertheless, a number of domestic measures is already prohibited under GATS. On this point, for example, domestic regulations on issues such as minimum capital requirements for companies, compulsory civil liability insurance, qualification procedures and requirements, technical regulations,

30 See CPC 923**/'Higher Education Services' and CPC 929**/'Other Education Services'.

31 S. Scherer, 'GATS: long-term strategy', op.cit.

32 See *Towards GATS 2000-a European Strategy*, WTO News: Speeches (2 June 1998).

among others, could breach GATS provisions.[33] In this regard, WTO Members that have scheduled commitments granting market access pursuant to article XVI are currently prohibited from adopting restrictive measures in the following areas: (a) number of suppliers, (b) value of assets or transactions, (c) number of operations or amount of the production (d) number of persons supplying the service, (e) type of legal person and (f) stake in foreign capital. These measures may not be imposed on foreign services companies unless the WTO Members have established terms to the contrary in their schedule. In consequence, significant restrictions are established on non–trade policies.

The GATS distinguishes specific liberalization commitments from domestic regulations required to fulfill public policy goals such as consumer protection, access to quality services, the requirement for universal access to essential supplies, integration of disadvantaged persons and groups in the labor market, the prevention of anti-competitive conduct, fair access to services irrespective of income or location, etc. However, implementing such objectives requires that domestic regulations should be administered in a 'reasonable, objective and impartial manner' and not producing *unnecessary barriers* to trade in services. Thus, significant tensions may arise when formulating domestic public policies.

The GATS also incorporates disciplines regarding domestic rulemaking processes.[34] In this regard, article VI.5 contains a mandate to develop disciplines regarding domestic regulation. For this purpose, section *a* establishes that WTO Members may not apply prescriptions on licensing requirements (e.g. professional licenses, distribution, handling licenses, etc), qualifications requirements (e.g. professional qualifications, certifications, accreditation of management of special services, etc) and technical standards (e.g. health, environmental and consumer standards, occupational safety, etc) which *nullify or impair* such specific commitments 'up to entry into force of disciplines created for those sectors' (ongoing negotiations on Disciplines on Domestic Regulation).

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33 G. Shaffer, *Public-Private Partnerships in WTO Litigation* (Brookings Institution Press 2003).

34 P. Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS–Disciplining Regulatory Behaviour in Services through Article VI of the GATS', 5 *Journal of International Economic Law* 10 (2006): 13–50.

In order to ensure that domestic regulations on licensing requirements, qualifications requirements and technical standards do not impair or nullify commitments, article VI.5 establishes (1) that these regulations shall be based *on objective and transparent criteria*, such as competence and the ability to supply the service, (2) that they shall not be more *burdensome than necessary* to ensure the quality of the service and, in the case of licensing procedures, (3) that they should not in themselves *be a restriction on the supply of the service*. In addition, domestic regulation could be nullify or impair commitments if it 'could not reasonably have been expected of that Member' at the time that the specific commitments were made. Finally, section *b* encourages domestic regulations to adapt to international norms –global standardization– by establishing that *'account shall be taken* of international standards of relevant international organizations' to determine compliance with the previous section (article VI.5.*a*).

Therefore, the so-called built-in agenda of the GATS promotes the establishment of WTO disciplines regarding qualification requirements and procedures, technical standards and licensing requirements and procedures. These disciplines are designed to be applied to all measures affecting trade in services within the scope of the GATS. In accordance, the Council for Trade in Services has a mandate to negotiate on this area pursuant to article VI:4. In order to comply with this provision, WTO disciplines are to be developed to ensure that domestic regulatory processes in this area 'do not constitute unnecessary barriers to trade in services'.[35] Thus, a WTO working party on domestic regulation was created to fulfill this mandate and thus negotiate a separate set of so-called 'horizontal' disciplines on domestic regulation to be applied to all services covered within the GATS scope. As a result, the basic principles to be considered in order to draft these 'disciplines on domestic regulation' are the following: (1) *necessity* (regulations which do not restrict trade or which are no more burdensome than necessary in order to achieve a specific and legitimate objective); (2) *transparency* (access to information on the regulatory process and the examination procedures for administrative decisions); (3) *equivalence* (taking into consideration qualifications and experience obtained abroad by suppliers) and (4) *international standards* (acceptance of international standards which facilitate assessment of foreign qualifications).

35 See JOB(02)/20/Rev.10, *Examples of Measures addressed by Disciplines under GATS article VI.4*, Informal Note by the Secretariat (31 January 2005).

By establishing this regulatory framework, WTO Members are certainly involved in a form of *meta-regulation*. That is to say, that WTO Members are involved in regulating domestic regulatory processes multilaterally or, in other words, regulating how to regulate. The first initiative negotiated within this framework focused on accounting services: the so-called 'disciplines on the regulation of the accountancy sector'. It is intended for these new disciplines to be integrated into the GATS at the end of the Doha Round.[36] Currently, the GATS working party on domestic regulation is not engaged in any sector-specific negotiation and is putting all its efforts into the development of the above mentioned 'horizontal' disciplines. In this regard, and pursuant to article VI:4, the 2005 Hong Kong Ministerial Declaration instructed negotiators in paragraph 5 of Annex C (Services) to adopt a text on horizontal disciplines before the end of the Doha Round.[37]

The reform of domestic regulations on qualification requirements and procedures, technical standards and licensing requirements and procedures may improve market access for foreign services providers. Many such foreign companies are currently excluded *de facto* from the provision of services as a result of regulations established by a variety of domestic authorities. However, regulatory reform in this area is highly sensitive, as establishing disciplines on domestic regulation may have a bearing on traditional functions of legislation and public administration. In this regard, the provision of services in the territory of each WTO Member is directly dependent on administrative regulations and practices formed throughout history. In fact, some of these may be associated with cultural identities as well as idiosyncrasies. Thus, the negotiating mandate article VI.4 does not prescribe an easy task, as horizontal harmonization is decidedly complex.

In any case, the project of disciplines on domestic regulation contained in the Chairman's Report, dated March 2009, is the current main reference draft in this area.[38] In addition, the 2011 Progress Report formalized the advances

36 See S/L/64, *Disciplines on domestic regulation in the accountancy sector* (17 December 1998).

37 See WT/MIN(05)/DEC, Doha *Work Program, Ministerial Declaration: Annexes*, adopted on 18 December 2005 (22 December 2005).

38 See *Second Revision, Draft Disciplines on Domestic Regulation pursuant to GATS Article VI.4, Informal Note by the Chairman, Room Document, 20 March 2009*, as contained in Doc TN/S/36 (21 April 2011).

made in the drafting of these Disciplines in three bracketed categories: paragraphs agreed on an *ad referendum* basis (category 1), on so-called single alternative (category 2) and on multiple alternatives (category 3).[39] In principle, the working party aims to ensure that all paragraphs would progress to the first and second category in a new revised project to be concluded in the mid term.[40] However, in 2014, it is hard to gauge what the final result of these negotiations will be, taking into account the regulatory complexity involved. In short, and to paraphrase Lester, the question is how to craft these rules so as to define the boundaries of international economic law in an appropriate way.[41] To give but one example, an issue on which there is no consensus among WTO Members is whether or not the disciplines should incorporate proof of the *need for regulation* as a 'regulatory criterion'.[42]

5. Prospects and policy trends

Understandably, the progressive liberalization of world trade in services raises some sensitive policy issues and concerns within non-trade constituencies. For this reason, already a decade ago the UN Human Rights bodies had made a public call for WTO Members not to inhibit access to basic services through trade concessions within the GATS regulatory framework.[43] Answering these concerns, the WTO community and insider network often explain that GATS provides sufficient flexibility to adapt to the policy needs of WTO Members.[44] However, flexibility depends on which specific commitment is included in the schedule, and how it is included, as explained above: market access and national treatment is accorded to those services for which liberalization com-

39 See S/WPDR/W/45, *Chairman's Progress Report on Disciplines on Domestic Regulation pursuant to GATS Article VI.4* (14 April 2011).

40 For a comparison with all draft proposals see RD/SERV/46/Rev.2, *Chairman's consultative note*.

41 See S. Lester, 'Finding the Boundaries of International Economic Law', *Journal of International Economic Law* 17 (2014): 3–9.

42 See SWPDR/W/45, paragraph 14. For the Secretariat notes on regulatory issues see S/WPDR/W/48, *Regulatory Issues in Sectors and Modes of Supply* (13 June 2012), Add.1 dated 30 April 2013 and S/WPDR/W/51, *Services-Related Regulatory Challenges faced by Developing Countries* (13 March 2013).

43 See *Liberalization of Trade in Services and Human Rights,* OHCHR (22 June 2002).

44 See *GATS: Facts and Fictions* (WTO 2014).

mitments have been scheduled, and only insofar as they have not included limitations.[45]

On this point, it is clear that the scheduling of commitments may be subject to strong pressures in favor of liberalization, as a direct result of offers and requests in this and/or other sectors. In practice, such is the logic of trade-offs; a traditional practice in trade negotiations which has fuelled the expansion of the world trading system for more than half a century. In this regard, it is important to recall that the WTO is a multi-issue negotiating forum. As such, negotiations in the services sector are connected to parallel negotiations in other areas (e.g. access to agricultural and/or textile markets in exchange for liberalization of banking and health services, etc). Therefore, sectoral as well as inter-sectoral trade-offs pave the way for progressive consolidation of commitments. Basically, the eventual transit from so-called 'non-consolidated commitment' to commitment 'with' or 'without limitations' in the GATS national schedules does not only depend on which specific liberalization offers are being brought to the services negotiating table by those who request commitments in a given services sector.

Also, once commitments are consolidated, any withdrawal of concessions requires alternative concessions in other areas (article XXI). In this regard, any modification of commitments consigned in the schedules requires renegotiating trade concessions with have affected WTO Members. As a result, paradoxically, the GATS negotiating framework ensures that changes in government (read national elections) cannot easily reform the policies that have already been consolidated in national schedules by previous governments.

At the present time, the GATS negotiations remain open within the context of a series of consultations.[46] However, the so-called 'Real Good Friends of

45 For vague or flawed entries in the access commitments scheduled under the GATS see in particular R. Adlung, P. Morrison, R. Martin & W. Zhang, 'FOG in GATS commitments - why WTO Members should care', 12 *World Trade Review* (2013): 1–27 and A. Rudolf & M. Roy, 'Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change', 39 *Journal of World Trade* (2005): 1161–1194.

46 See TN/S/38, *Report by the Chairman of the Council for Trade in Services in Special Session of 14 March 2014* (21 March 2014).

Services' group (70% of global GDP)[47] have opened services negotiations in parallel.[48] This new initiative, resulting from the impasse in Doha talks and the uncertainties of its final success, builds upon some GATS core provisions as well as services commitments already contained in recent FTAs.[49] Under this strategy promoted by the 23 RGF members to improve market access for their services industries,[50] the GATS functions as a form of regulatory template for a new plurilateral Trade in Services Agreement (TiSA) in or outside the WTO.[51]

Nevertheless, incorporating an initiative such as TiSA within the WTO regime is a far from easy prospect. Many WTO Members perceive variable geometry to be a systemic challenge for the WTO regime, as it could undermine its traditional multilateral approach to trade liberalization.[52] In fact, variable geometry has been generally contested by emerging economies such as Brazil, India and China for many years. However, China recently changed its position and made a request to join the TiSA negotiations on September 29, 2014. As a result, while many WTO Members are currently taking the view that negotiations outside the WTO could undermine GATS negotiations, those involved in the so-called TiSA negotiations are obviously highlighting their potential for cross-fertilization.[53]

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47 The current WTO members involved in this initiative include Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, EU, Hong Kong, Israel, Japan, Mexico, New Zealand, Norway, Panama, Pakistan, Peru, South Korea, Switzerland, Turkey, and the United States. For recent fine studies on this area see A. Hoe Lim & B. de Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge University Press 2014).

48 See *Advancing Negotiations on Trade in Services*, Joint Statement (5 July 2012).

49 See 'Services Liberalization Talks Among Group of WTO Members Move Forward', 16 *Bridges Weekly Trade News Digest* 34 (10 October 2012).

50 See 'Services Talks within WTO Members Group Advance, Eyeing Launch of Formal Negotiations', 17 *Bridges Weekly Trade News Digest* 4 (6 February 2013).

51 See P. Sauvé, 'A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement (TiSA)', *NCCR Working Papers* 2013/29 (May 2013). For a critical analysis of current negotiations see S. Sinclair & H. Mertins-Kirkwood, *TiSA versus public services,* Public Services International (28 April 2014).

52 See *Delhi Declaration: Fourth BRICS Summit*, New Delhi (29 March 2012).

53 See TN/S/38, *Council for Trade in Services Special session, Report by the Chairman of the Council for Trade in Services in special session of 14 March 2014 (*21 March 2014), paragraph 1.5.

4

Process and production methods delinked from trade

1. Trading environment

The way in which to reconcile environmental protection and economic integration, and thus trade liberalization, poses a challenge to global governance.[1] In fact, achieving synergies or a balance between the two has been widely acknowledged as a major global policy issue since the latter years of the past century.[2] However, today not one structural policy transformation has taken place towards the sustainability of world production and distribution of goods and services. This particular issue offers an apt and appropriate case study to explore the approach of the world trading system towards non-trade issues. In this regard, environmental externalities in world trade law are essentially a by-product of delinking process and production methods (PPMs) from trade.[3] Currently, as mentioned in the first chapter, the environmental externalities of global supply chains are not multilaterally regulated.

The pertinent question is, to what extent does free trade promote social efficiency, when the price of goods and services globally produced and distributed does not reflect its environmental costs? In this regard, some ideas of economic efficiency regarding trade are oversimplified, as non-repairable environmental degradation cannot be quantified in monetary terms: in short,

1 For one of the first fine work on the links between the multilateral trade system and the environment see, in particular, D. Esty, *Greening the GATT: Trade, Environment, and the Future* (Institute for International Economics 1994). More recently, see J. Watson, *The WTO and the environment: development of competence beyond trade* (Routledge 2013).

2 J. Bhagwati, 'Trade and the Environment: The False Conflict?', *Trade and the Environment: Law, Economics, and Policy* (Island Press 1993) at 159.

3 J. Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict', 49 *Washington and Lee Law Review*, Symposium: Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict? (1992):1227–1277.

price systems cannot determine value when costs are incommensurate (i.e. survival of our species).

Nevertheless, transforming the status quo is anything but easy. Traditional political cycles in parliamentary democracies do not normally govern policy issues or design policies with the long-term in mind, as in centuries, rather than decades. In short, environmental conservation is not a central issue in the global agenda because the citizens of the future cannot vote.[4] Public leaders have little incentive to make environmental protection the 'rule of the game' generally and, consequently, we trade the environment. In practice, environmental policies depend very much on the degree of social awareness and pressure in developing and developed countries alike; while the lack of social pressure endures, development policies will continue to free-ride on the environment: as a result, setting up global standards for production, distribution and consumption is not a priority in either developed or developing societies, as priorities and preferences tend to focus in the short-term, on improving current standards of living.

However, as environmentalists and other critics claim, the genuine agenda for pareto efficiency in global governance is inter-generational equity, as this would maximize the preservation the Earth and our species.[5] Under this rationale, what makes markets (and market transactions) possible is the environment itself. In the absence of the medium, markets and market-mechanisms do not function (e.g. price-based competition), as they simply do not exist: no life. In this line of reasoning, approaching efficiency through the mere policy prism of alternative uses is basically macro-inefficient, as some environmental damages can never be monetized, or internalized.

This phenomenon is what makes people approach sustainable development as the optimum efficiency criterion in itself, or the 'most efficient criterion of

4 See Ch. Stone, *Should trees have standing?: law, morality, and the environment* (Oxford University Press 2010).

5 On intergenerational ethics see, in particular, C. Wolf, 'Environmental Ethics, Future Generations and Environmental Law', *The Routledge Companion to Philosophy of Law* (Routledge 2012) at 397-414; C. Wolf, 'Intergenerational Justice', *Blackwell Companion to Applied Ethics* (Blackwell 2003) at 279-294 as well as the fine monograph of E. Brown Weiss, *In fairness to future generations*: *International Law, Common Patrimony and Intergenerational Equity* (Transnational publisher 1989).

efficiency' for our species; at least while we fail to develop further technologies enabling us to migrate elsewhere. Essentially, while such technologies remain unavailable, *sustainable development* is said to be the most efficient overarching principle to govern open markets; a term originally coined by the so-called Brundtland Report of the UN World Commission on Environmental and Development (*Our Common Future*) in 1987. The concept has some grey areas but nevertheless also lucidly captured certainties:

'Sustainable development is *development that satisfies current needs without endangering the capacity of future generations to satisfy their own needs*.'

The problem is how we operationalize sustainable development in practice, and the world trading system is a paradigmatic case of study in this regard, as it has developed a clear legal position towards externalities in all regulatory areas, including the environment. For this reason, the environment provides an appropriate case study to explore the phenomenon of *delinkage* in trade law. In principle, by reading the Preamble to the WTO Agreement, it is easy to conclude that sustainable development is an end-goal of the world trading system. In fact, the very first decision of the Appellate Body sustained that in both the Preamble and the WTO Decision on Trade and Environment 'there is specific acknowledgement to be found about the importance of coordinating policies on trade and environment'.[6] WTO *panels* have also defined sustainable development as 'one of the objectives of the WTO agreement'.[7] However, the regulatory structures of world trade are unable to easily integrate sustainable development.

Trade representatives promote world economic integration by practicing, as they see fit, a complex game of trade-offs in which environmental dilemmas are embedded but generally deducted. These basically concentrate on negotiating foreign market access for their domestic business constituencies. Thus, protection of the environment is subject to the vicissitudes of a cacophonous

6 WT/DS2/AB/R, *United States-Standards for Reformulated and Conventional Gasoline* (20 May 1996) at paragraph 30. See also J. Jackson, 'Justice Feliciano and the WTO Environmental Cases: Laying the Foundations of a 'Constitutional Jurisprudence' with implications for Developing Countries', *Law in the Science of human Dignity* (Cambridge University Press 2005).

7 See WTDS58/R/W *United States-Import Prohibition of Certain Shrimp and Shrimp products (recourse to article 21.5)*, paragraph 5.54.

and multi-level negotiating scenario in which a wide variety of special and general interest groups coincide in just one thing: namely, endeavoring to make the WTO rulebook reflects their interests. As a result, trade negotiations are carried out to the accompaniment of intense background noise: a complex network of companies, industry associations, and civil society organizations propose, claim and suggest negotiating policies and positions to trade ministers, often even on negotiations site. It is no accident that environmental ministers have no seat at the negotiating table. As the world trading system is in itself a regulatory by-product of the values of those who manage it, reconciling the value of open markets with the value of environmental protection within the pro-trade GATT/WTO framework is thus an unaccomplished responsibility of those who manage the evolution of this functionalist institution: namely, trade ministers.

The Havana Charter from which the GATT of 1947 was devised, as has been explained, had a more open and multi-functional approach.[8] However, after its demise, trade representatives adopted a regulatory approach mainly focused on the progressive liberalization of trade. As a result, social issues relating to trade –including environmental protection– are now addressed from a firm pro-trade (read functional) regulatory stance. Nowadays, this functional approach permeates not only the world trading system but an increasing number of PTAs. Thus, it is not easy to refute the criticisms of those who denounce the restrictive (or self-contained) rationality of both multilateral and preferential trade regimes since decades ago.

The foundations for greater environmental awareness and sensitivity regarding trade were laid with the advent of ecology groups in developed countries during the nineteen sixties. But it was not until the eighties that the first environmentalist voices were heard in political circles and the media. Before that, in the seventies, the GATT Secretariat made a small contribution to the UN Stockholm Conference on Human Environment (1972),[9] and provided technical assistance to the drafters of the Convention on International Trade and Endangered Species (CITES) on issues of legal compatibility with GATT rules (1973). From then on, and during the first half of the nineties, a climate of

8 C.A. Wilcox, *A Charter for world trade* (Macmillan 1949).

9 See *Industrial Pollution Control and International Trade,* GATT Studies in International Trade 1 (GATT Secretariat 1971).

concern with respect to the development model promoted by the GATT arose among conservation organizations, originally and particularly in the United States:[10] a development model denounced to deduct world sustainability and thus purely based on the mere reduction of 'trade barriers', in WTO-speak. The shortcomings of this state of affairs led to a long-lasting negative attitude towards the world trading system among a significant part of the environmental community. In this regard, the problems of transparency, the functioning of panels behind closed doors, and the structural pro-trade bias of GATT rules and case law –beginning with the second report of 1991 in the *Tuna case*–[11] contributed to consolidate a climate of concern.

The origins of this state of affairs can be traced back to the complex historical evolution of the world trading system. Following the adoption of GATT in 1947, and until the Tokyo Round was completed (1973-1979), the world trading system basically evolved in relative isolation in respect of non-trade branches of domestic government, as well as other non-trade global regimes. As explained, the GATT Contracting Parties had their reasons for proceeding in such a way: the GATT (as organization) originally lacked of any proper institutional structure –except for that loosely provided in article XXV– and survived under provisional application (that is, non-ratification) for many decades.[12] Given these structural weaknesses, trade representatives consciously chose to concentrate on liberalization in relative self-containment, engaging in few relationships with non-trade global regimes as well as non-trade domestic agencies. This original and rather odd legal status, outside international legal standards, given its decades of provisional application, imbued the inner GATT structures with a deep functionalism, and thus an original tendency to avoid multi-functional ventures such as, among others, conditioning trade to non-trade policies.

Therefore, it is no accident that the first international body to address the link

10 See for example the advertisement by Greenpeace, Friends of the Earth, Sierra Club and Public Citizen published in various US periodicals (eg. *New York Times*) under the title "Sabotage" (14 December 1992).

11 For the two cases see 'United States—Restrictions on Imports of Tuna', 30 *International Law Materials* (1991) 1594 (unadopted panel report, August 16, 1991) and 'United States—Restrictions on Imports of Tuna', 33 *International Law Materials* (1994) 839 (unadopted panel report, June 16, 1994).

12 See chapter 2.

between trade and environment was not within the confines of the GATT but the OECD, when the latter created a working group on this issue in 1991.[13] Prior to this, a working group on environmental measures and international trade had been established by the GATT Contracting Parties in 1971, but it never actually met; and nor did the Tokyo Round (1973-1979) take environmental issues on board. However, trade diplomacy moved to a radically different level playing field with the launch of the Uruguay Round in 1986, by successfully negotiating an impressive set of legal instruments (24 covered agreements) under its package-deal approach. Thus, the 'only trade business on board' with regard to the environment was no longer tenable. As a result, at the Ministerial Conference of Marrakesh (1994), the Final Act concluding the Uruguay Round, and officially establishing the WTO, incorporated a General Council Decision creating the WTO Committee on Trade and Environment (CTE).

Since its inception, ten years after the publication of the Brundtlant Report (1984), the CTE has performed an important task of analysis and data compilation as well as inter-institutional dialogue with the Secretariats of the UN Multilateral Environmental Agreements (MEAs). However, the contribution to environmental protection by trade ministers through the CTE has been limited at best. As it stands today, according to paragraph 51 of Doha Development Declaration, the CTE functions (together with the Committee on Trade and Development) as a 'forum to identify and debate developmental and environmental aspects of negotiations', and thus is devoid of any endeavor to promote structural policy change in this area.

Despite being well into an age of increasing policy interdependence, the inclusion of environmental issues in the world trading system is scant. Thus, the efforts of environmental groups to have some impact on the status quo through this committee ended in disappointment time ago. Reconciling trade and environment on the basis of the long established pro-liberalization GATT/WTO *acquis* is not easy: it requires breaking with the deep-rooted inertia of a set of rules which has been successfully providing measurable results of progressive liberalization for more than half a century (eight rounds of trade negotiations). The CTE is in itself an illustrative example of the dif-

13 K. Woody, 'The World Trade Organization's Committee on Trade and Environment', 8 *Georgetown International Environmental Law Review* 3 (1996): 458–463.

ficulties inherent in this task; established by the above mentioned Decision of the GATT General Council on 15 April 1994, it first operated as a preparatory subcommittee until it was incorporated in the institutional structure of the WTO with its entry into force (January 1, 1995). From its beginnings, this deliberative body lies in no–man's land, and has also been viewed with mistrust by developing countries and environmental movements alike. The latter, in particular, have generally questioned that such a critically systemic issue should be dealt with by a mere committee. In fact, creating committees often operates as a mere delaying tool, allowing public-decision makers to press on with their agendas, while providing a temporary buffer for some problems; and the environmental community is well aware of this standard phenomenon in comparative politics. The general attitude was quite clearly framed by the WWF several years ago:

'Internally, the time has come to "mainstream" environmental concerns into the work of all relevant WTO bodies and agreements, rather than leaving the topic to the debate of a single, disconnected committee'.[14]

Even during the early days of the committee, the specialized literature was also conclusive in this regard. Tarasofsky, for example, holds that the CTE will not be an appropriate forum for seeking a balance between trade and environment while it remains unable to act and choose between different and difficult political decisions.[15] The CTE's inability to submit proposals lies in the polarization of their positions and the reluctance of trade representatives of developing countries, to whom the committee facilitate disembarkation of the so-called green protectionism in the WTO. In fact, Item 6 of the CTE's work program as well and paragraph 32 (i) of the Doha Declaration give attention to this particular issue under the heading 'environmental requirements and market access'. [16]

The challenge has two related dimensions. As mentioned, during the initial stages of the world trading system, trade ministers from developed countries –who originally designed the GATT and controlled its evolution– pushed for

14 See "An Open Letter to WTO Members on the Occasion of the High Level Symposium on Trade and Environment", WWF (15-16 March 1999).

15 R. Tarasofsky, 'The WTO Committee on Trade and Environment: Is it making a Difference?', *Max Planck Yearbook of United Nations Law* (1999) at 471–488.

16 WT/MIN(01)/DEC/1, *Doha Ministerial Declaration*, adopted on 14 November 2001.

regime-building by providing it with an intensely functional approach towards progressive liberalization. However, today, in the post-consolidation WTO stage, their counterparts from developing countries have gained significant control over WTO functioning, and are not willing to amend a set of rules that significantly help them attract FDI and outsourcing contracts by amplifying global supply chains. Interestingly, the first report submitted by the CTE to a Ministerial Conference (Singapore) made such facts evident:[17] not less than 10 delegations, dissatisfied with some content, rushed out to formally state that this very first report did not modify 'rights and obligations' under the WTO Agreements, was not binding, and could therefore not be used 'as a basis for legal action under the Dispute Settlement Understanding' (sic).[18] Such declaration of principles clearly frames the structural problem: namely, that the main development model available in global governance nowadays is world trade; as the direct transfer of income and resources from developed to developing countries is marginal in comparison with the transfer of rents within global supply chains today. Thus, developing countries are quite aware that their lifeline for economic development is to produce and distribute goods and services with the help of the legal infrastructures of open trade.

In essence, no country has achieved sustained growth without importing, producing and exporting a diversifying range of value-added goods and services. In addition, developed countries have not supported development models combining free trade with significant direct transfers of rents or income to developing countries. Hence, world trade is the all-pervading tool for economic development. Logically, in consequence, developing countries fiercely resist all policy proposals conditioning market access to compliance with *x* or *y* environmental standards. The structural tension between developing and developed countries on this issue has, therefore, a direct impact on environmental policies in general, whether domestic or international. As a result, getting trade representatives from developing countries to see eye to eye with the environmental constituency on issues such as global standards of production and distribution, or even the ecological footprint of the world trading

17 WT/CTE/1, *Report (1996) of the Committee on Trade and Environment* (12 November 1996).

18 WT/CTE/M/13, *Committee on Trade and Environment-Report of the Meetings held on 30 October and 6-8 November 1996,* Note by the Secretariat (22 November 1996).

system generally,[19] is close to a Herculean task. For developing countries, not incidentally, raising those standards through international hard-law linked to trade has a direct impact on their competitive advantage. Therefore, it is highly unlikely that multilateral consensus will be achieved on this point in the future –no matter how limited it may be– without developing a non-trade restrictive new deal in which developed countries transfer significant rents to developing countries.

2. Trade measures and tests

The use of trade restrictions for environmental purposes does not appear to generally constitute a best policy option to efficiently make environmental fixes. Arguably, environmental protection is better promoted by means of resource-intensive regulatory frameworks based on structural technology transfer, capacity building and other related public policies without the need for restricting world trade and economic development.[20] Nonetheless, having said this, it is reasonable to question the establishment of any general policy prohibition against the use of trade measures to advance environmental policies and objectives. In principle, and notwithstanding that trade restrictions are not a panacea, no policy tool should be automatically kept aside from the toolkit of policy design, and neither should it be structurally excluded for any policy reasons in global governance (i.e. open markets as an end in itself). After all, policy is the art of making things happen so, in order to do so, every potential policy tool has to be available in the toolkit of multilateral policymaking.

On the other hand, it is always difficult to define so-called trade-related measures, as well as hierarchy or order within the relationship. After all, what is

19 N. Ahmad & A.Wyckoff, 'Carbon Dioxide Emissions Embodied in International Trade of Goods', OECD Science, Technology and Industry Working Papers 2003/15 (2003) and S. Nakano, A. Okamura, N. Sakurai, M. Suzuki, T. Tojo & N. Yamano, 'The measurement of CO2 embodiments in international trade: Evidence from harmonised input-output and bilateral trade database', *OECD Science, Technology and Industry Working Papers 2009/3* (2009).

20 See C. Osakwe, 'Finding New Packages of Acceptable Combinations of Trade and Positive Measures to Improve the Effectiveness of MEAs: A General Framework', *Trade and Environment: Bridging the Gap*, op.cit.p.48.

related to what, environment to trade, or trade to environment? Arguably, both social values (trade and environment) are inter-related, and thus not subject to any hierarchy from a general policy perspective. Terms used in policy making are not neutral. By using the term 'trade measure' –as opposed to 'environmental measure'– we are also condoning a conceptual framework which surreptitiously influences the formal allocation of authority on such measures to trade ministers and the regimes in which they participate (i.e.: WTO, etc). By doing so, trade representatives are transformed into the ultimate authority deciding whether or not (and in which cases) such measures shall be used to form public policy in practice.[21] Steve Charnovitz makes quite a reasonable point in this vein:

'In view of the fact that the environment regime does not use trade measures differently than the trade regime does, it is astonishing that the trade regime has had the temerity to question such use. Environmentalists are being put through psychoanalysis to explain why they depend on trade measures; yet the habits of the trade regime receive no similar scrutiny (or self-scrutiny).'[22]

The phenomenon referred to above inevitably produces a chilling effect on environmental policies, as any environmental measure is eventually subject to the test of WTO law. Historically, notable provisions which hamper the adoption of some environmental policies are articles I (MFN clause), III (national treatment) and XI (quantitative restrictions) of the GATT, as well as article XX (exceptions), which goes explicitly into the protection of natural resources, among other issues. In addition, the agreements within the Annexes of the WTO agreement resulting from the Uruguay Round contain new legal requirements. The GATT article XX (exceptions) is the most illustrative provision on this point, as it is the classical parameter of legality for environmental policies pursuant to world trade law. In principle, this provision from the GATT of 1947, and preserved in the GATT of 1994, acknowledges the right of domestic authorities to apply environmental policies. However, it requires these policies to fulfil a series of conditions. Thus, the chapeau to article XX requires that the measure in question (1) would not constitute a means of *arbitrary or unjustifiable* discrimination and (2) it would not be a *disguised*

21 See T. Schoenbaum, 'Trade-Related Environmental Measures (TREMS): The United States Perspective', *Trade and the Environment: The search for Balance*, op.cit.pp.366-372.

22 S. Charnovitz, 'The Role of Trade Measures in Treaties', op.cit.p.117.

restriction on international trade. In turn, sections *b* and *g* regulate in detail the exceptions that grant GATT legality to measures adopted for environmental purposes. The requirements of article XX merit careful reading:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures... (b) necessary to protect human, animal or plant life or health;... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

The detailed case law of the Appellate Body and panels explains how the exceptions should operate in practice. In this respect, any *restrictive trade measure* is subject to a 'necessity test' modulated with some elements of proportionality. In order to determine whether or not a measure is *necessary,* the test requires several operations:

(1) Estimating the value protected by the measure in question,
(2) Evaluating the choice of the measure selected to protect said value and
(3) Analyzing the impact of the measure on trade.

Pursuant to the chapeau of article XX, from the moment the measure in question is considered 'necessary', it will then be required to evaluate whether it is being applied in a *non-protectionist* manner. To this effect, the case law to date has established that there should be a balance between WTO requirements on market access and the state's right to promote non-trade policies. The task of determining whether or not this is the case, is based on the chapeau of article XX, designed to combat undercover protectionist measures:

'The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception . . . and the rights of the other Members under varying substantive provisions . . . The location of the line of equilibrium . . . is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.'[23]

23 WT/DS58/AB/R, *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998), paragraph 159.

In short, the firm pro-trade approach is evident. In addition, it is sufficient to recall that the Appellate Body has defined article XX, from its earliest years, as an *affirmative defense*; that is, there are no presumptions: justification is required. Thus, for example, the adjudicative body of the WTO determined as follows in *United States-Shirts and Blouses*:

'Articles XX and XI: (2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.'[24]

Therefore, in the case of a dispute, the WTO Member applying a measure to protect the environment should demonstrate (burden of proof) that the measure is compatible with GATT rules. Needless to say, so-called *prima facie* presumptions are not easy to rebut in practice.[25] In this respect, any domestic measure or regulation adopted by WTO Members for environmental purposes not only needs to comply with article XX of the GATT and related case law, but also with provisions included in the so-called covered WTO agreements (GATS, TRIPs, TBT agreement, etc).[26] Thus, this complex 500 pages regulatory hub inhibits some environmental policy designs and regulations.

In this context, the issue of manufacturing standards is particularly illustrative, as considerable degree of environmental degradation is not caused by the products in themselves, but by the process and production methods (PPMs) employed to manufacture them. Therefore, standards related to the global supply chain are particularly relevant from an environmental perspective. Here, in principle, it is reasonable for public authorities not only to address the environmental effects resulting from the products (product standards) but from their own production process (process and production standards). For this reason, we tend to conceptually distinguish between 'product-related PPM', in which consumption externalities are generated, and 'non-product related PPM', which generate production externalities.[27] Nonetheless,

24 WT/DS33/AB/R, *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (25 April 1997).

25 J. Cameron, 'The GATT and the Environment', op.cit.p.101.

26 C. Wold, 'Multilateral Environmental Agreements and the GATT', op.cit.p.863.

27 C. Stevens, 'Synthesis Report: Trade and Environment: PPM Issues', *Trade and Environment: Processes and Production Methods* (OECD 1994) at 7–22.

the world trading system is neutral towards compulsory PPM on domestic products, but not with regard to imported products:[28] in short, world trade law prevents domestic authorities to take into legal consideration the way in which foreign products entering the domestic market have been produced.

The institutional fabric of trade liberalization structurally operates under a prohibition to discriminate among so-called *like products*.[29] Thus, articles I and III of the GATT which have legally reflected this prescription since 1947 are usually described as the 'corner stone of the GATT'. In this regard, states have almost zero margins to link policy measures to aspects other than physical characteristics of a product such as, for example a highly pollutant chemical within the product in order to pursue environmental policy objectives. Technically, domestic measures linked to the non-physical aspect of products (NPAs) are not compatible with GATT. In other words, world trade law does not allow a distinction to be made between physically identical products based on aspects which are not revealed in the product itself. Any discrimination between products with similar characteristics is, a *priori*, not GATT-compatible, with only the exception of prison labor in section (e) of article XX, authorizing discriminatory measures against products manufactured or assembled in prisons.

In short, any state which unilaterally regulates the PPMs of imported products

28 On this issue see in particular See Ch. Conrad, *Processes and production methods (PPMs) in WTO law: interfacing trade and social goals* (Cambridge University Press 2011); R. Read, 'Process and Production Methods and the Regulation of International Trade', *The WTO and the Regulation of International Trade: Recent Trade Disputes between the European Union and the United States* (Elgar 2005) at 239–266; S. Charnovitz, 'The Law of Environmental PPMs in the World Trade Organization', 27 *Yale Journal of International Law* (2002); S. Charnovitz, 'Solving the Production and Processing Methods (PPMs) Puzzle', *The Earthscan Reader on International Trade and Sustainable Development* (Earthscan 2002) at 227–262, and S. Gaines, 'Processes and production methods: how to produce sound policy for environmental PPM-based trade measures?', 27 *Columbia Journal of Environmental Law* 2 (2002): 383–432.

29 See T. Howse & D. Degan, 'The Product/Process Distinction- an illusory basis for disciplining 'unilateralism' in trade policy', 11 *European Journal of International Law* (2000): 249–289, and F. Roessler, 'Beyond the Ostensible: A Tribute to Professor Robert Hudec's Insights on the Determination of Likeness of Products Under the National Treatment Provisions of the General Agreement on Tariffs and Trade', 37 *Journal of World Trade* (2003): 771–781.

and services faces a potential legal claim before the world trade jurisdiction. This is the case, for example, of public policies promoting so-called responsible consumption, which underlying idea is that PPM information may internalize part of the environmental costs of the production of goods and services through consumer freedom of choice, and thus responsible consumption. In this context, global compulsory eco-labeling has become an alternative policy avenue for advancing environmental policies related to PPM.[30] However, regulating the disclosure of information on PPM is also controversial within the four corners of the world trade community: are states allowed, for example, to require product labeling to inform citizens/consumers that a given product is made from Amazonian timber instead of wood grown in a sustainable forest? The Austrian parliament got involved in this very issue as long as 20 years ago, by establishing mandatory labeling of imported tropical woods. This piece of Austrian legislation required a label to indicate the wood's origin, and regulated the labeling criteria for imported timber from sustainable forests. The regulation was hotly debated within GATT.[31] Finally, threats to exclude Austrian bidders from government procurement by timber-exporting countries in Southeast Asia such as Indonesia, and particularly Malaysia, forced Austrian parliament to reconsider and ultimately revoke this 'first in its class' import-oriented eco-labeling legislation by making the labeling requirements strictly voluntary.[32]

These limitations on policy and regulatory design with regard to PPMs are questioned outside the confines of the trade community, particularly with regard to environmental global policymaking. In the words of a reputed environmentalist, Daniel Esty: 'today, *how* things are made as well as *what* is traded is an issue'.[33] In this regard, the environmental community has for

30 See, JOB/TE/9, *Eco-labelling: Overview of Current Work in Various International Fora*, WTO Secretariat (29 September 2010), JOB/TE/7 *Environmental Labelling-related Specific Trade Concerns and Notifications in the TBT Committee*, WTO Secretariat (17 September 2010) and WT/CTE/W/10, G/TBT/W/11, *Negotiating History of the Coverage of the TBT Agreement with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, WTO Secretariat (29 August 1995).

31 See *Communication of the Contracting Parties members of the ASEAN* (L/7110), GATT C/M/260 (26 November 1992) at 45–64

32 W. Lang, 'Is the Protection of the Environment a Challenge', op.cit.p.466.

33 D. Esty, 'Economic Integration and the Environment', *The Global Environment: Institutions, Law, and Policy* (Congressional Quaterly, 1999) at 203.

years been criticizing the pro-liberalization bias with which these regulatory structures are shaping environmental policies within global economic interdependence. The problem is global regulation on PPMs. In fact, multilateral environmental regulation of PPMs is today unlikely; and public initiatives for developing global compulsory ecostandards are notable for their absence.[34] In this sense, the deployment of trade measures in environmental treaty initiatives is blocked by the WTO rules in practice. In fact, there is an extended perception among trade representatives and officials that international environmental negotiations have in recent years used trade-related measures too freely. Nonetheless, moving from fiction to facts, only 20 out of 250 Multilateral Environmental Agreements (MEAs) include trade-related measures, in part because the power balances between trade ministries and environmental ministries are inclined towards the former. In this regard, the WTO Secretariat keeps an updated *Matrix on trade measures pursuant to selected multilateral environmental agreements* at the request of WTO Members.[35]

However, non-trade agreements have used trade-related measures for over a century. In fact, one of the first treaties to use such measures (for health and environmental purposes) was the International Convention on *Phylloxera* of 1878.[36] But nowadays, trade representatives tend to identify trade-related measures within their natural exclusive competence and thus as policy instruments within the treaty-based regimes and regulatory networks that they manage.[37] As a result, these tend to perceive trade restrictions as second best policy options for tackling environmental problems, as there are always better alternatives available than restricting free trade. To paraphrase Robert Howse's critical stance, free traders can always imagine, in the abstract, an alternative policy instrument to trade restrictions, which is less trade restrictive and supposedly more efficient.[38]

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34 T. Cottier, 'The WTO and Environmental Law: Three Points', op.cit.p.57.

35 For the last revision See TN/TE/S/5/Rev.3 and WT/CTE/W/160/Rev.5, *Matrix on trade measures pursuant to selected Multilateral Environmental Agreements*, Note by the Secretariat–Revision (15 June 2011).

36 See S. Charnovitz, 'A Taxonomy of environmental Trade measures', 6 *Georgetown International Environmental Law Review* 1 (1993): 1–46

37 See the comments of Alan Oxley (former GATT Council chairman) in A. Oxley, 'The relationship between MEAs and WTO rules', *Trade and Environment Review* (2003): 93.

38 R. Howse, 'Human rights in the WTO: whose rights, what humanity? Comments on Petersmann' 13 *European Journal of International Law* (2002): 645.

The problem affects two particularly significant phenomena: on one hand, there is a chilling effect on the use of trade-related measures in multilateral environmental policy design and rulemaking; on the other, the possibility that any environmental measures –albeit domestic or international– may be subject to the jurisdiction of the world trading system amplifies that effect. Technically, a WTO panel may declare at any time that any trade-related measure adopted for environmental purposes within or at implementing a MEA is incompatible with world trade law. On the other hand, it is not realistic to expect the contrary. Furthermore, although world trade rules were not originally designed to confirm the legality of policy measures adopted within the framework of MEAs, the jurisdiction of the WTO rules and procedures is not prevented from deciding on domestic measures applied in compliance with those. Given this state of affairs, most of the environmental community resorts to pragmatism and the philosophy of the possible in policy design, and thus also probably to second or third best policy options.

3. PPMs in global supply chains

The chilling effect produced in modern environmental law and policy by the regulatory structures of global exchange is evident. As explained, not only are PPM rules on imported products and services incompatible with WTO law, so is mandatory disclosure of information on PPM for imported products and services. PPM information may only be introduced voluntarily through contractual arrangements between producers, distributors, retailers and consumers. That is, public authorities are not authorized to establish the binding disclosure of information with regard to PPMs of goods and services globally produced and distributed. This contingency goes beyond trade policy, by structurally restricting the way we are modeling our future. Not surprisingly, the Earth Summit's Agenda 21 formally recommended governments that environmental policies should be present throughout the production cycle, and not just at the end. However, the WTO regime and its dispute settlement procedures somehow function as a 'red button' regarding such policy options. In addition, other cabinet colleagues –including ministers for the environment– have been kept outside the regulatory structures of world trade since decades. In this context, to paraphrase Steve Charnovitz, there is a clear danger in giving the WTO power over the use of

environmental measures 'without any responsibility for achieving environmental outcomes'.[39]

A question often comes to the table of environmental authorities assessing policy and regulatory options: 'is the proposal compatible with WTO law?'. World trade law limits environmental policy design, by effectively inhibiting the options available. Regulatory standards on PPMs of imported products and services as well as the mere disclosure of information regarding PPMs are mere but significant examples. However, changing this status quo is difficult, as amending treaty-based regimes to amplify policy rationality often exact a high political cost. Alternatively, there are proposals already on the table to provide a counterbalance, by reinforcing and/or establishing new global environmental regimes. Pascal Lamy, while being WTO Director General, encapsulated the challenge in the following lines:

'The solution to the potential imbalance [...] lies, I believe, in strengthening the enforcement (the effectiveness) of other legal orders so as to rebalance the relative power of the WTO in the international legal order'.[40]

Perhaps establishing a new global environmental regime as a counterbalance would constitute a systemic solution to some of these problems, by opening the door to world policy adjustment and rebalancing. As Tarullo explains, the preeminence of the WTO vis-à-vis other treaty-based regimes such as MEAs, is due to two key interconnected processes: the strong political leverage of trade agencies nowadays, as well as the relative weakness of some of those regimes.[41] However, it is not easy to expect that the world trade constituency –including, in particular, trade ministers from developing countries– would accept such a transformation. The same occurs with respect to the establishment of a constitutionalized (and thus higher) treaty-based regime with jurisdictional authority to develop regulatory synergies between specialized regimes (i.e. WTO *vs* MEAs). Traditionally, there is a deep reluctance among states to alter the

39 S. Charnovitz, 'A new paradigm for trade and the environment', 11 *Singapore Yearbook of International Law* (2007): 40.

40 P. Lamy, 'The Place of the WTO and its Law in the International Legal Order', 17 *European Journal of International Law* (2006): 984.

41 D. Tarullo, 'The Relationship of WTO Obligations to Other International Arrangements', *New Directions in International Economic Law. Essays in Honour of John. H. Jackson* (Kluwer Law International 2000) at 171–172.

loose legal relationships between specialized treaty-based regimes (e.g. trade, environment, health, etc) and thus to promote a stronger inter-institutional integration. World institutional integration? Certainly, such eventual development would be a *terra incognita* for all, and particularly for the elected representatives operating within parliaments and governments; in short, the guardians of the status quo. Far from it, it is more likely that trade ministers will sustain their effort to prevent other global negotiating fora (climate change negotiations, etc) from rebalancing the power laws of world trade.

In essence, any non-trade diplomatic conference which comes to the negotiating table with trade related measures is likely to have its knuckles rapped. In any case environment ministers and their constituencies have not remained idle; taking a pragmatic approach, the environmental community is currently pushing for other strategies in the short and medium term, while working to develop future policy space and momentum for upgrading the coherence of world policymaking in the long run. As a result, the new pragmatic vocabulary concentrates on 'increasing synergies' and 'reducing tensions' between the trade and environment regimes. The term *synergy* has gained credence in high-level meetings, plans, programs, and policy documents; as a less confrontational and more pragmatic solution than those currently offered by international law on conflicts of treaties.[42] The UNEP itself, for example, has for several years been leading an initiative to increase synergies, reduce tensions, and thus improve so-called *mutual support* between the rules and policies of MEAs and the WTO:

'Building mutually supportive relationships will require policy-makers to identify areas of intersection between MEAs and the WTO, to maximize synergies, and to minimize areas of potential tension. While each is significant, the discussions until now of MEA-WTO linkages have, in the view of many environmental policy-makers, focused disproportionately on potential tensions (e.g. potential for MEA measures to create "trade distortions", or their theoretical compatibility with WTO rules). This perspective does not necessarily reflect the priorities of MEAs.'[43]

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42 For the first steps see, in particular, *Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization: A Synthesis Report*, UNEP (January 2002) and also WT/CTE/W/155, *UNEP Statement at the Information Session with Multilateral Environmental Agreements*, Communication from UNEP (7 July 2000).

43 See 'Background and Opening of the Meeting', *UNEP Meeting on Enhancing Syner-*

In fact, the objective of closer cooperation was also recognized in the implementation plan of the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg, calling for efforts to 'strengthen cooperation among UNEP and other United Nations bodies and specialized agencies, the Bretton Woods institutions and WTO, within their mandates'. These pro-coordination policies are becoming increasingly common. In the absence of enough political will to carry out major structural transformations in the legal and institutional architecture of global governance, they provide at least one way of moving forward[44]. In short, these pragmatic approaches are certainly of some use in building some bridges between the world trading system, the UNEP and the MEAs.

The WTO Ministerial Declaration launching the ongoing Doha Development explicitly includes environmental issues for the first time in the history of the world trading system, 'with a view to enhancing the *mutual supportiveness* of trade and environment' (paragraph 31). In doing so, WTO Members agreed to begin negotiations on 'the relationship between existing WTO rules and *specific trade obligations* set out in multilateral environmental agreements (MEAs)' (section i), on procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status (section ii) as well as the liberalization of trade in goods and services that can benefit the environment (section iii). For its part, paragraph 51 of the Declaration also calls on the CTE and the Trade and Development Committee to act as 'forums for debating the environmental and developmental aspects of the negotiations so that the objective of sustainable development can be achieved'. This undertaking by WTO Members to change its cultural isolation by actively seeking increased inter-institutional dialogue and collaboration with the MEAs and the UNEP is to be welcomed. The Preamble of the Doha Declaration Preamble is in itself an expression of good intentions:

'We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development' (paragraph 6)

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gies and Mutual Supportiveness of MEAs and the WTO, Palais des Nations (23 October 2000).

44 TN/TE/S/2/Rev.2, *Existing forms of cooperation and information exchange between UNEP/MEAs and the WTO*, Note by the Secretariat, Revision (16 January 2007)

Under this narrative, the WTO has already granted observer status at the CTE to several MEAs Secretariats,[45] and also holds annual 'information sessions', which are attended by the MEA Secretariats.[46] Similarly, the WTO regularly organizes senior level meetings and events in collaboration with the UNEP (eg, providing technical assistance to developing countries). However, nowadays, promoting synergies means just that: inter-institutional dialogue. Thus, structural policy transformations are highly unlikely under such collaborative schemes and, in fact, are not at all on the agenda of the world trade community.

Ensuring the convergence –read also international legal coherence– of the multiplicity of specialized regimes already in place in global governance is no easy task. Jacobson described the phenomenon two decades ago:

> Decision making in Intergovernmental Organizations [IGOs]... tends to be a dialogue among segments of governments and the executive head and permanent staff of the IGO. What counts is what governments say in the particular IGO, not what they say in another; hence the relative unimportance of representatives of other IGOs. If governments wished or were able to enforce coordination among their departments concerning IGO policy, they would do this in national capitals, not through other IGOs. *The lack of coordination within governments permits and indeed fuels considerable rivalry among IGOs and jurisdictional disputes among IGOs are frequent*.[47]

This fair description of the state of affairs within treaty-based global governance nowadays vividly applies to the so-called trade and environment linkage generally. While awaiting more responsibility from elected representatives in the mid and long term, it would be reasonable to concentrate greater efforts and resources on increasing synergies among these treaty-based regimes in the short term. Evidently, inter-institutional dialogue and coordination will help. However, it is not enough for delivering global policy coherence. Major transformations are required, as the status quo is not an option in the long run. However, taking into account the stalemate regarding policy approach-

45 WT/CTE/W/41/rev.10, *International Intergovernmental Organizations-Observer Status in the Committee on Trade and Environment*. Revision (4 February 2003).

46 See WT/CTE/W/160/Rev.5, TN/TE/S/5/Rev.3, *Matrix on trade-related measures pursuant to selected Multilateral Environmental Agreements* (15 June 2011).

47 H. Jacobson, *Networks of Interdependence: International Organizations and the Global Political System* (Alfred A.Knopf 1984) at 118.

es towards environmental externalities between developing and developed countries, it would be reasonable to argue that sustainable development will not become a systemic driving force of supply chains while a major structural trade-off is on the negotiating table for the occasion. In short, the stakes for building consensus on such a systemic issue are high.

4. Variable legal optics

The lack of a new global deal or trade-off between developing and developed countries largely impedes international environmental law from playing a major role in global economic interdependence, and thus also prevents any MEAs from becoming a counterbalance to the world trading system in the near future, as explained.[48] As a result, it is easy to see why MEAs and WTO rules and acts do not currently converge. Interestingly, the issue has been correctly framed and mapped within the CTE, in order to identify potential long term strategies to mitigate such problems. In this regard, legal issues related to the link between world trade law and MEAs absorbed the first meetings of the CTE, almost two decades ago. In this respect, the issue was included in the work program from the very first days of the CTE. The related legal issues addressed in the program read as follows:

(1) Conflicts between provisions,
(2) Conflicts between their different dispute settlement mechanisms and
(3) The use of trade measures in MEAs.[49]

Furthermore, point 1 of the work program was 'the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental

48 See in particular F. Biermann, 'The emerging debate on the need for a World environmental organization: a commentary', 1 *Global Environmental Policy* 45 (2001): 45–55 S. Charnovitz, 'A World Environment Organization', 27 *Columbia Journal of Environmental Law* (2002): 323–362.

49 For an excellent work on treaty and jurisdiction conflicts between the MEAs and WTO law, see G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: the relationship between the WTO Agreement and MEAs and other Treaties', 35 *Journal of World Trade* 6 (2001): 1081–1131.

agreements'. In turn, point 5 addressed 'the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements'. In this regard, for some observers, a possible channel for integrating environmental protection in the world trading system is to defer legally to both domestic and international environmental law. However, trade representatives have been unable to agree on any protocol granting deference to the rules and acts of MEAs, as well as to domestic measures implementing MEAs. As a result, the task of delimiting these questions within the world trade regime has been undertaken by WTO case law, filling the gap by default.

Nevertheless, the WTO dispute settlement mechanism does not grant MEAs identical legal status to WTO covered agreements within its applicable rules. That is, the WTO-legality of any environmental rule or act is conditioned on compliance with pro-trade legal criteria, as explained. In other words, legal control resides in the realm of the word trade regime and constituency. For this very reason, at the very first WTO Ministerial (Seattle 1999), a joint expert report submitted to the USTR by US environmental NGOs was already proposing to establish a policy of legal *deference* towards the UNEP and the MEAs within WTO: under such a proposal, the world trading system could grant legal deference to their rules and acts (granting legal relevance *ad intra* to external rules and acts) and, in addition, the UNEP and the MEAs Secretariats could obtain some expert status within the WTO jurisdiction in cases dealing with disputes related to environment.[50] It goes without saying that the proposal, also backed by some environment ministers, did not come to fruition.

Following on from this, for a time, there were some who felt that questions on the legal relationship between these regimes would be resolved in an eventual WTO dispute over contradictions between a MEA and WTO law.[51] However, no such cases have arrived at the WTO jurisdiction for an obvious reason: access to its procedures (*locus standi*) is in the hands of trade representatives; and as it is they who hold the whip hand, it is unlikely that structural legal issues such as these will often arise in practice. Reasonably, if environmental agencies had standing in WTO dispute settlement procedures, things

50 NGO Technical Statement,op.cit.p.3.

51 See C. Wold, 'Multilateral Environmental Agreements and the GATT', op.cit.p.921.

would certainly be different. In short, trade representatives not only avoid filing such complaints but also tend to avoid making strong legal arguments on grounds of international environmental law. Furthermore, and not surprisingly, the panelists and judges working within the WTO jurisdiction also tend to give preference to the applicable rules of the treaty-based regime in which they are serving as legal experts, and are generally reluctant to depart from them in order to eventually apply other rules of public international law.

In the light of this situation, as explained, domestic measures implementing environmental agreements may be subject to compliance with the criteria of article XX of the GATT (exceptions) and its case law, for example, among other WTO legal requirements and conditions contained in the WTO covered agreements. In addition, as mentioned, it is difficult to include trade measures for environmental purposes in new treaties: their use is quite restrictive nowadays, given the particular zeal with which trade diplomats control international rulemaking in this area. In other words, the well known pragmatism and so-called flexibility of the GATT/WTO community sharply contrasts with its historical rigidity in addressing environmental issues and concerns.

The status of MEAs vis-à-vis WTO is an illustrative example of the relative value of trade and the environment in global governance nowadays. In this regard, some environment ministers have occasionally resisted the current state of play by developing self-referential legal provisions (eg. clauses of conflict) incorporated in MEAs attempting to regulate their relationships with world trade law.[52] In consequence, from the nineties onward, several environmental agreements incorporate legal references to the world trading system with diverse degrees of legal detail. For example, article 3.5 of the United Nations Framework Agreement on Climate Change contains the following provision:

'The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.'

52 For similar global phenomena involving other government portfolios (i.e. culture ministers) see chapter 7 in this book.

In turn, article 22 *(Relationship with other international agreements)* of the 1992 Convention on Biodiversity stipulates the following in paragraph 1:

'The provisions of this Convention *shall not affect the rights and obligations* of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.'

Thus, the Biodiversity Convention indirectly declares that its rules prevail over those of the WTO, at least in the event of *serious damage or threat to biological Biodiversity*. In short, the Convention grants itself a conditioned primacy over other treaties through self-referential provisions. Section 2 of article XIV (*effect on domestic legislation and international conventions)* of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) expressly regulates its relations with trade agreements:

'The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.'

Furthermore, section 3 of article XIV of this Convention states as follows:

'The provisions of the present Convention *shall in no way affect* the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a *union or regional trade agreement* establishing or maintaining a common external Customs control and removing Customs control between the parties thereto insofar as they relate to trade among the States members of that union or agreement.'

Multiple MEAs contain provisions regulating their legal relationships with trade agreements generally. However, many trade agreements also provide self-referential clauses in this respect. In addition, such clauses are costly to design and tend to be non-operational in practice. In this regard, agreeing on the final wording of these provisions is becoming increasingly difficult in treaty making negotiations. As a result, the battle for primacy between treaties tends to be solved in a radically different level playing field, namely that of the compliance incentives embedded in those treaties. After all, compliance with

treaties is essentially dependent on their institutional design. Consequently, policy tensions are solved in pure Darwinist terms by the so-called secondary rules of adjudication contained in each treaty. Failure to comply with some treaties is comparatively distinct from failure to comply with others; and this phenomenon obviously applies to the relationship between WTO and MEAs, as the WTO jurisdiction relies on its potential capacity to authorize the suspension of trade concessions and other obligations, while MEAs do not enjoy any comparable enforcement mechanism whatsoever. In this sense, WTO dispute settlement is significantly more effective in comparative terms.

Evidently, at all events, issues of forum shopping may obviously arise: technically, the same dispute may be resolved by means of applying world trade law or, alternatively, by means of international environmental law. In this regard, it is always possible for an environment minister to submit a claim to a MEA dispute settlement mechanism which addresses a trade-related issue as well. The *Swordfish case* is a particularly interesting example in this regard.[53] Nevertheless, these hard-cases are exceptional, as governments tend to avoid such schizoid multi-jurisdictional scenarios by all means. For this very reason, the relationship between the WTO dispute settlement and the dispute settlement mechanisms contained in MEAs are point 5 of the original CTE work program; and also for that reason, the WTO Secretariat regularly monitors the dispute settlement trends in MEAs.[54]

53 See WT/DS193/1, *Chile-Measures affecting the transit and importation of Swordfish* (26 April 2000), and *Case concerning the conservation and sustainable exploitation of Swordfish Stocks in the South Eastern Pacific Ocean, International Tribunal for the Law of the Sea*, Order 2000/3 (20 December 2000), as well as WT/DS193/3, *Chile-Measures affecting the transit and importation of Swordfish: arrangement between the European Communities and Chile* (6 April 2001).

54 For a detailed description of these mechanisms see WT/CTE/W/191, *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, Note by the WTO and UNEP Secretariats, Secretariat Note (6 June 2001)

5

Linking trade to world propertization of intangibles

1. Propertization of intangibles

The Agreement on Trade related aspects of intellectual property (TRIPS) adopts a two-pronged approach to international standards, as Picciotto clearly frames it, by firstly incorporating into WTO law the main provisions of the Berne Copyright Convention and the Paris Industrial Property convention; and secondly, establishing a large number of minimum requirements for IP protection, in relation not only to substantive IP law but their enforcement procedures.[1] How the world trading system came to enter into the intellectual property area, by crafting the TRIPS agreement outside the WIPO, is an illustrative example of the intertwining of international lawmaking with power politics and business lobbying.[2] At the beginning of the 1980s, parties to the Paris Convention for the Protection of Industrial Property -the oldest convention providing protection for patented inventions- applied the rules of non-discrimination and national treatment to patents and patent applications but retained country autonomy in substantive criteria of patentability.[3] In the 1980s and early 1990s, a Diplomatic Conference held under the auspices of WIPO attempted to revise the Convention. However, developing and developed countries could not agree on critical issues such as, in particular, the terms and conditions to grant compulsory licensing (CL).[4] In fact, attempts by developing countries to upgrade CL

1 See S. Picciotto, *Regulating*, op.cit.p.234.

2 See also chapter 3.

3 See *Paris Convention for the Protection of Industrial Property, March 20, 1883, as revised at Stockholm* (1967).

4 See eg. J.H, Reichman & C, Hasenzahl, *Non-Voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in Canada and the USA*, UNCTAD/ICTSD–Project on IPRs and Sustainable Development, Issue Paper No. 5 (2003).

provisions in article 5A of the Convention critically contributed to bringing the Conference to an end.[5]

The failure of the Conference persuaded IP constituencies from technology-exporting countries to promote a forum shift to the next round of GATT multilateral trade negotiations: the Uruguay Round, beginning in 1986.[6] In short, the US IP constituencies shifted their strategy from the IP to the world trading system and pushed the United Trade Representative to follow suit as a final effect of the crises facing the WIPO in its dealings with the US in the 1960s and 70s, when this regime became a forum for criticism of patents and copyright. The move to the world trading system also aimed to benefit from the comparative institutional advantages of the GATT dispute settlement mechanism, that was to be improved in the Uruguay Round trade negotiations.[7] Therefore, with the entry into force of WTO, a pure jurisdictional reallocation or 'forum shifting' took place, establishing new global standards for IP protection under the TRIPS agreement.[8] In essence, trade ministers managed to introduce IP protection within the world trading system by using a strategic association of ideas: 'trade-relatedness'. As a result, multilateralized IP protection is now part of the so-called WTO covered agreements and is thus enforceable through its binding dispute settlement mechanism.

The TRIPS agreement multilateralizes intangible propertization, granting IP holders with legal monopolies over knowledge and information. By estab-

5 Compulsory licensing is as old as patent law. For the historical origins of the patent system see, in particular, I. Mgbeoji, 'The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization' 5 *Journal of History of International Law* (2003): 403–422.

6 See *Existence, scope and form of generally internationally accepted and applied Standards/Norms for the Protection of Intellectual Property-Note prepared by the International Bureau of WIPO* (15 September 1988). MTN.GNG/NG11/W/24/Rev.1.

7 For the negotiating history see J. Ross & J. Wasserman, 'Trade-Related Aspects of Intellectual Property Rights', *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II (Kluwer Law and Taxation Publishers 1993) at 2241–2313 and D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet and Maxwell 1998).

8 For the first studies on the *forum-shifting paradigm* see J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge University Press 2000) at 564–571 and L. Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', 29 *Yale Journal of International Law* 1 (2004): 1–83.

lishing minimum global standards for IP protection in a top-down approach towards harmonization,[9] the TRIPS agreement produces a major transformation in the history of IP protection[10]. In doing so, it is the most far-reaching and comprehensive treaty ever to be concluded in the intellectual property area, equally applicable to both technology importing and exporting countries.[11] Technology importing countries "agreed" to negotiate the TRIPS agreement under the pressure of US trade unilateralism.[12] The agreement was negotiated in the shadow of unilateral trade sanctions pursued by the USTR, as the Omnibus Trade and Competitiveness Act in 1988 (the so-called Special 301) amended Section 301 of the US Trade Act of 1974 in order to upgrade the tools for the USTR to target so-called unfair foreign IP protection.[13]

GATT contracting parties such as Brazil, India, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and the former Yugoslavia were among the most active developing countries opposing IP lawmaking in the Uruguay Round, claiming that the world trading system was primarily concerned with trade and not property rights in intangibles.[14] However, their initial resistance for a narrower interpretation of the negotiating mandate at the Round (Ministerial Declaration of 1986) broke down in 1988, with the amendment of the above mentioned Section 301. Entering into operation in 1989, the Special 301 granted USTR the authority to apply unilateral trade sanctions against

9 P. Stephan, 'Institutions and Elites: Property, Contract, the State, and Rights in Information in the Global Economy', 10 *Cardozo Journal of International Law and Comparative Law* (2002): 305–306.

10 C. Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2008) at 1.

11 C. Correa & A.Yusuf, *Intellectual Property and International Trade: the TRIPS Agreement* (Kluwer Law International 1998) at xvii.

12 See K. Watal, *Intellectual Property Rights in the WTO and Developing countries*, Oxford University Press, 2001 and R. Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement', 17 *Emory International Law Review* 2 (2003): 819–918.

13 See, particularly, M. Ryan, 'The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking', 19 *University of Pennsylvania Journal of International Economic Law* (1998): 558–559

14 J. Bradley, 'Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations', 23 *Stanford Journal of International Law* (1987): 8.

countries providing 'insufficient' protection of intellectual property. It is indicative that 5 of the 10 countries in the hard line group against incorporating IP protection in the new GATT Round were listed for bilateral attention in the first USTR announcement of Special 301 country targets; countries such as Argentina or Egypt were placed on the Watch List, while both Brazil and India –the leading opponents of the US agenda– were placed on the Priority Watch List: Special 301 most serious country-category in USTR's annual Reports on IP.[15] As a result of these power politics, WTO annexes today contain an agreement on so-called trade-related IP protection.

Almost a decade since the TRIPS agreement entered into force, there has been growing criticism from developing countries regarding that grand bargain, as they have to live with stringent IP standards producing significant transfer of rents to developed countries.[16] Evidently, developed and developing countries alike were generally in ignorance about its likely effects on knowledge and information markets.[17] At that time, trade negotiators from developing countries had scant exposure to the western arcane technicalities and expertise on intellectual property.[18] As Drahos recalls, many of them did not have a clear understanding of their interests and, in fact, were not 'in the room' when critical technical details were settled.[19] As a result, the TRIPS agreement has produced some unforeseen adverse effects on the domestic policies of the developing world (eg. health policies).[20]

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15 F. Abbott, 'Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework', 22 *Vanderbilt Journal of Transnational Law* (1989): 689 and 708–709.

16 See *Integrating intellectual property rights and development policy*: Report the Commission on Intellectual Property Rights (2003) at 8.

17 P. Drahos, 'Developing Countries and International Intellectual Property Standard-setting', *Study Paper 008 of the Commission on Intellectual Property Rights* (United Kingdom 2001) at 13.

18 P. Drahos, 'Developing Countries', op.cit.p.13.

19 See P. Drahos & J. Braithwaite, *Information* op.cit at 190–191 and F. Scherer, 'A Note on Global Welfare in Pharmaceutical Patenting', 27 *World Economy* (2004): 1127–1142.

20 On the distributional effects of TRIPS patent protection with regards to pharmaceuticals see, in particular, E. Benvenisti & G. Downs, '*Distributive Politics and International Institutions: The Case of Drugs',* 36 *Case Western Reserve Journal of International Law* (2004): 21–52.

Small groups tend to be more adept than the general public at organizing the ways in which they pursue their interests, as their transaction costs are lower.[21] In essence, IP business constituencies from technology-exporting countries successfully managed not only to take on board IP within the world trading system but also to set its content. In this way, developed countries basically over-protected the interests of their industries. In short, the drafting of TRIPS rules can be fairly described as permeated by special interest.[22] Thus, the very existence of the TRIPS agreement and a good deal of its content owes much to the global firms that guided the USTR strategy during the Uruguay Round, with well-staffed teams of corporate IP experts and lawyers assisting the US negotiators.[23] In practice, the USTR acted as a proxy for IP constituencies –beginning at the US Advisory Committee on Trade and Policy Negotiation– and European countries, among other developed countries, followed suit.[24]

Therefore, the TRIPS agreement can be fairly described as a regulatory by-product of business lobbying.[25] Its drafting was seriously and strongly influenced by a precisely circumscribed coalition of private technology exporters; namely, the twelve companies that originally founded the Intellectual Property Committee (1986) in order to mobilize support for this initiative.[26]Basically, a model of IP protection that had originated in the developed world was transplanted to the developing world by means of international

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21 M. Olson, *The logic of collective action: public goods and the theory of groups* (Harvard University Press 1965) at 22–36.

22 See P. Drahos & J. Braithwaite, *Information* op.cit (chapters 8 and 9).

23 In the words of Sell: "it was not merely their relative economic power that led to their ultimate success, but their command on IP expertise, their ideas, their information, and their framing skills (translating complex issues into political discourse". See S. Sell, *Private Power* op.cit.p.4

24 For an insightful business case study on the participation of Pfizer in the development of international trade law see M. Sontoro & L. Paine, 'Pfizer: Protecting Intellectual Property in a Global Marketplace', *Harvard Business School,* Case study No. 9-392-073 (1992).

25 See S. Picciotto, *Regulating global corporate* op.cit, P. Drahos & J. Braithwaite. *Information* op.cit and J. Braithwaite & P. Drahos, *Global business* op.cit.

26 For the whole process of this regulatory 'private-public partnership' see in particular P.Drahos & J. Braithwaite, *Information* op.cit and G. Dutfield, *Intellectual Property Rights and the life science industries: A Twentieth Century History* (Ashgate 2003).

law.[27] As Susan Sell boldly put it, a dozen corporations managed to make public law for the world.[28] The subsequent sections of this chapter take patents as a case study on the impact of TRIPS disciplines on open markets and societies generally.

2. World legal monopolies

Patents are propertized knowledge goods. In pure analytical terms, patents entail the artificial creation of scarcity by state intervention.[29] In this regard, the conceptual nature of abstract objects (or incorporeal rights) created by patents is challenging in itself.[30] As Cohen explains, whatever technical definition of property we prefer, a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things: a right is held against one or more individuals.[31] A patent confers exclusive rights over an invention for a fixed period of time, by giving its holder control over the legal conditions of the invention to be commercially produced and distributed. This government-granted power over knowledge is not only strong private power but legal monopoly power: article 27.1 of TRIPS agreement requires all WTO Members to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to tests of novelty, inventiveness and industrial applicability. In accordance with section 1 of this article, patents are required to be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced.

By issuing a patent over an invention, a legal monopoly is set up, since any tradable good and service containing traces of that knowledge operates under proprietary control, and is thus enforceable in courts, for a period of time. In short, the so-called *exclusive rights regimes* in which patents are embedded

27 See S. Tully, *Corporations and International lawmaking* (Martinus Nijhoff 2007).

28 See S. Sell, *Private Power* op.cit.p.96.

29 See S. Picciotto & D. Campbell, 'Whose Molecule Is It Anyway? Private and Social Perspectives on Intellectual Property', *New perspectives on property law, obligations and restitution* (Cavendish 2003) at 280.

30 See P. Drahos, *A Philosophy of Intellectual Property* (Aldershot 1996) (chapters 2 and 7).

31 See M. Cohen, '"Property and Sovereignty"' 13 *Cornell Law Quaterly* 8 (1927): 12.

remove the general authority to act on knowledge, by locating legal authority in the hands of a private agent: the patent-holder; any possible negotiation over the granting of a voluntary license under these legal vehicles is within the expansive realm of freedom of contract. Therefore, patent-holders appropriate knowledge and trade it or not at will –voluntary licensing– by clearing prices aside from market mechanisms (read price-based competition). Once inventors are granted a patent, this legal device allows the owner full control over the registered invention in all goods and services built on that given technology. From then on, the patent-holder has the exclusive right to decide how, when and under what terms the invention is to be marketed in any domestic jurisdiction of the world in which the patent is obtained.

This is the inner logic of government–sponsored patent protection since its earliest inception. However, the multilateralization of IP protection has not only created a new level-playing field for patents but has produced a critical global transformation, by reengineering the legal treatment of conventional tangible property vis-à-vis intangible property. Firstly, under TRIPS provisions, the physical property of any traded good yields to the intangible property. In this sense, in accordance with article 51, non-IP complying goods can be physically destroyed by courts, in *at least* –read again at least– those cases of trademark counterfeiting or copyright piracy on a commercial scale.[32] The policy change over physical property deserves attention:

(1) the intangible is given precedence over the thing (/physical carrier);
(2) the property of the intangible is given precedence over the propriety of the thing and
(3) the owner of the intangible is given precedence over the proprietor of thing.

Secondly, patent rights over one invention can technically embrace most of the globe, as inventors can file patent applications almost universally, as a result of TRIPS disciplines: already 160 WTO Members, and counting. As WTO Members have standardized their IP rules in line with TRIPS provisions, any infringement of a patent granted to a foreigner in a given state is fully enforceable in its courts and tribunals. Technically, this implies that a company

32 See Section 4 of Part III on enforcement in TRIPS agreement (article 51 and accompanying legal footnote 14) and section 2.

may protect its IP rights almost throughout the entire world; again, from 1 to at least 160 jurisdictions. In fact, the feasibility of obtaining aggregated multi-state revenues from a given invention is only counterbalanced by the so-called doctrine of international exhaustion of IP. In short, unauthorized imports of goods using proprietary technologies are generally considered to be an infringement of patent rights, except when a state applies such doctrine, which is in any case uncommon.[33]

TRIPS-based standardized legal protection is available in all state jurisdictions in which the patent has been granted, irrespective of development levels. Consequently, the patent-holder may decide on whatever fits her / his plans, whether to market the invention directly, or to license it in some or all domestic territories (right to exploit invention). Thus, until patent protection ends, a so-called 'orderly marketplace' of sequential windows of exploitation is globally reproduced to be governed by the patent-holder, either directly –through ownership– or indirectly –through contract–, and often combining with other IP assets such as copyright. During a minimum 20 year period, the patent-holder legally controls the commercial conditions for any given company to access the invention (royalties) as well as for users to access goods and services built on that proprietary technology (prices): revenue obtained from the working of a patent is potentially boundless for that period. Therefore, large patent-holders with large IP portfolios can easily play out their intangible properties across multiple jurisdictions, maximizing global returns by subdividing or segmenting territories in unlimited windows of exploitation.

The global transfer of rents produced by such schemes should not be underestimated. From a purely profit-maximizing perspective –namely, those embedded in the corporate form and structure–, the patent game is highly cost-effective. Obviously, because IP owners can reach into the material world through the things (goods) and activities (services) built on their proprietary intangibles –and thus also control vital resources– the multilateralization of IP protection through the TRIPS agreement is sometimes depicted

33 See F. Abbott, 'First Report (Final 1997) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel importation', 1 *Journal of International Economic Law* 4 (1998): 607–636 and M. Pugatch. *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Edward Elgar 2006) at 180–181.

as the foundation for a new form of capitalism, which focuses on the control of abstract objects (intangible assets), instead of physical objects (tangible assets).[34] The culmination of this development is the global reach of patent protection, as knowledge operates as an optimum object of propertization, since it is non-rivalrous in supply. As Braithwaite and Drahos recall, the same knowledge can be endlessly recycled globally to generations, each one having to pay for use or access.[35] Hence, sustained pressure towards the global ratcheting up of intangible propertization makes completely rational economic sense for IP-based companies, particularly if these are publicly traded and thus tied to the mast of maximizing shareholder value. To paraphrase Drahos, TNC's unity on the IP front is based on the deep ideology of hyper-effective IP protection, not on the specific rules; as this enables investment in the conversion of knowledge from a public good into a private one, and then set the terms of access in accordance.[36]

Half a century ago, Machlup argued that 'no economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss to society'.[37] However, things have significantly changed in recent decades, as multi-jurisdictional protection of IP allow patent-holders to lock up knowledge on the aggregate, by registering patents in multiple jurisdictions. Notwithstanding the conventional framing of this phenomenon as market exclusivity, patents have not much to do with market exclusivity as they operate in 'separate and privately controlled territories' in which access to goods and services is built on legal monopolies. Thus, by permitting those monopolies to be obtained in multiple jurisdictions, a significant legal transfer of rents from society to patent-holders (and their licensees) takes place, as these can freely decide across countries the prices and price differentials of any good or service using a proprietary technology.

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34 J. Braithwaite & P. Drahos, *Global business* op.cit.p.57.

35 P. Drahos & J. Braithwaite, *Information* op.cit.p.216.

36 P. Drahos, '"IP World"–Made by TNC Inc', *Access to Knowledge in the age of Intellectual Property* (Zed Books 2010) at 211.

37 See F. Machlup, *An Economic Review of the Patent System, Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary*, United States Senate, 85th Congress, Second Session, Study No. 15 (1958) at 79 and B. Hindley, *The Economic Theory of Patents, Copyrights, and Registered Industrial Designs: Background Study to the Report on Intellectual and Industrial Property* (Economic Council of Canada 1971).

Under TRIPS provisions, a patent granted in a set of jurisdictions transforms the patent-holder into a global controlling authority over the uses of a technology. In this regard, the patent-holder has the right to decide the terms of access, and may also discriminate between those requesting access (eg. selective exclusive licensing) or even fail to allow access to some. As far as privilege is concerned, infringers are outside the law and, as explained, their goods (physical objects) infringing intellectual property (intangible objects) are to be disposed of outside the channels of commerce, and even physically destroyed by public authority. In this sense, the TRIPS agreement contains strict enforcement procedures for enabling right holders, in cooperation with customs administrations, to prevent the release of IP infringing imports into global circulation, and also to physically destroy those goods. These effects are regulated in section 4 of part III of TRIPS. Therefore, article 44 states that judicial authorities should be empowered to order injunctions, including the possibility of preventing imported infringing goods from entering the domestic territory. In addition, article 46 requires WTO Members to grant courts the authority to order infringing goods to be disposed of outside the channels of commerce or, 'unless this would be contrary to existing constitutional requirements, destroyed'. As already explained, according to article 51 and its footnote 14, the goods subject to border enforcement procedures *must include at least* trademark counterfeiting or copyright piracy on a commercial scale for importation and exportation; and article 61 establishes that the infringements of IP rights are open to criminal proceedings, and thus to eventual imprisonment and/or monetary fines in the territory of all WTO Members. Finally, reiterated in this last article, 'in appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods'.

The logic of global propertization of intangibles is so autonomy-enhancing that companies holding large portfolios of such power-assets are quite proactive when it comes to allocating resources for the ratcheting up of global standards. In this regard, it could be argued that the TRIPS agreement has imbued IP business constituencies with some negative incentives. In practice, many companies are increasingly proactive in extending patent scope, strength and term through lobbying, in order to obtain extra tranches of legal monopoly, both domestically and globally, and in one form or another. Allocating resources to the manufacture of official consent makes rational economic sense

for the larger players: the most egregious example is the so-called TRIPS-plus agreements currently promoted by technology-exporting countries on a bilateral or regional basis,[38] as these subject IP standards to a regular ratcheting up.[39] Not incidentally, as a result, public interest coalitions are forced to take constant action in a wide variety of forums, as an ongoing cycle of action and reaction.[40] In this sense, for example, the European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA) under its Lisbon Treaty power to reject international agreements; for the first time after the entry into force of the Lisbon Treaty, EU MPs exercised this power against this IP enforcement treaty (478 votes against, 39 in favor, and 165 abstentions).[41]

3. IP linkage to trade

The legal power of patents over markets and society should not be taken for granted. It is no accident that centuries old tensions exist over patents and free trade. Patents and free trade have experienced deep controversies throughout history for a reason. In fact, the first organized social movements questioning patents, during the 19th century,[42] were already focusing their criticism on the adverse effect of these legal monopolies on free trade and laissez-faire.[43] The basis of such criticism lay in the fact that patentees use the patent system to restrain the movement of goods across borders. As Drahos and Braithwaite observe, propping up the patent system and other IP

38 US bilateral treaty-making on IP did not begin with but was intensified after TRIPS. In this regard, see P. Drahos, 'BITs and BIPs: Bilateralism in Intellectual Property', 4 *The Journal of World Intellectual Property* (2001): 807–808.

39 See P. Drahos, 'Developing Countries and' op.cit.p.21.

40 See F. Abbott, 'The Cycle of Action and Reaction: Developments and Trends in Intellectual Property and Health', *Negotiating Health: Intellectual Property and Access to Medicines* (Routledge 2006) at 31.

41 See *European Parliament legislative resolution of 4 July 2012 on the draft Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement* (4 July 2012).

42 For the history of English patent laws see C. MacLeod, *Inventing the Industrial Revolution: The English Patent System 1660-1800* (Cambridge University Press 1988) and H. Dutton, *The Patent System and Inventive Activity during the Industrial Revolution 1750-1852* (Manchester University Press 1984).

43 F. Machlup & E. Penrose, 'The patent controversy in the nineteenth century', 1 *Journal of Economic History* 10 (1950): 1–29.

systems at the expense of free trade turned out to be something of a long-run miscalculation by states, as these systems would later be routinely used as the backbone of global cartels during the 20th century.[44] However, probably downplaying or underestimating the economic and social impact of cartels in the interwars period, an extra layer of pro-patent public rules has been added at the end of last century, not only ratcheting IP standards worldscale but directly linking world trade to IP compliance.

Evidently, law and lawyers play a key historical role in shaping the changing forms of capitalism,[45] and IP linkage to trade is one of those forms. As mentioned, in the final two decades of the last century, a small group of IP-based industries from the pharmaceutical, entertainment and software sectors pursued the goal of standardizing world patent protection and related IP forms through new multilateral treaty law; and they were successful. The IP agenda of these companies during the Uruguay Round focused on (1) upgrading the legal protection of traditional IP forms, as well as (2) allowing IP owners to control world trade flows on all IP-based goods and services. By succeeding, access to goods and services based on a proprietary technology is globally determined by legal monopoly owners and the ancillary inter-corporate arrangements built around them. By manufacturing standardized legal monopolies in 160 state jurisdictions, a powerful redistributive device is channelled from citizens and consumers around the world towards the shareholders of companies operating IP-based global business strategies. In this regard, the structural transformations resulting from legal instruments such as the TRIPS agreement go quite beyond IP standardization, as this agreement now allows patent-holders to set the terms of trade regarding any good and service built on their proprietary technologies.

Thus, a structural change in global industrial organization has taken place over the last three decades as a direct result of linking IP to trade through the TRIPS agreement. By linking IP to trade, companies holding patents in

44 See P. Drahos & J. Braithwaite, *Information Feudalism,* op.cit.p.36.

45 See S. Picciotto, *Regulating corporate capitalism* (Oxford University Press 2010), generally, Y. Dezalay, 'Between the State, Law, and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena', *International Regulatory Competition and Coordination* (Clarendon Press 1996) at 59–87 and Y. Dezalay & B. Garth, 'Law, lawyers, and Empire', *The Cambridge History of Law in America. The Twentieth Century and After (1920-)* (Cambridge University Press 2008) at 718–758.

multiple territories have the enforceable prerogative to globally decide over the import or export of any good or service produced under their proprietary technology: in short, free trade is now the prerogative of the patent-holder. Hence, the genius of trade is inhibited in the interest of those companies doing business in proprietary knowledge. In practice, the linkage of IP to trade produces a private form of trade conditionality, as those who now often condition trade are no longer states but monopoly traders governing the movement of IP-based goods and services through property and contract. In the new world of IP linked to trade, the terms of trade for goods and services built on proprietary technologies have been structurally reframed. Nowadays, while goods and services with unauthorized traces of proprietary technologies are entering or leaving a domestic jurisdiction, IP owners and their licensees can interfere and fully restrict free movement of those goods and services, with the help of private policing and customs inspections.

It is therefore reasonable to argue that, by linking world trade to IP compliance, the TRIPS agreement has structurally transformed the old notions of trade, understood as entrepreneurs acquiring things in one place on Earth and selling them in another. It could be said that, 'the activity of buying and selling, or exchanging, goods and/or services between people or countries', as trade is currently defined in the Cambridge English Dictionary for example, does not so easily apply to the (vertically controlled) free movement of IP-based goods and services. As world exchange enters the realm of IP based intra-firm and inter-firm arrangements, traditional images of open trade vanish. Under world trade linked to IP, patent-holders are granted the discretionary power to authorize world trade in goods and services built on their proprietary technologies, as these are anchored to a globalized monopoly right. Patent-holders operate as monopoly traders (or trading monopolists); and their voluntary licenses for all the goods and services built on their proprietary technology are also a form of *trading licenses*. In short, the legal monopolist decides who trades, and in what conditions; and the privilege can be registered under standardized terms in the patent offices of 160 jurisdictions of the world. For the critics, the patent document in a way transforms its holder into a gatekeeper to every state territory in which those rights are granted.

In short, IP linkage to trade allows patent-holding companies to have a com-

mon-and-control position on the global production and movement of all goods and services based on their proprietary technologies. Once a large company obtains an essential and/or breakthrough patent, a vertical legal infrastructure to exploit that patent can be developed world-scale. These vertical infrastructures managed by the patent-holder, often with the assistance of licensees, take the form of a hub-and-spokes legal scheme in which the terms of trade are defined by IP terms: naturally, once a company wins a key patent, other companies begin to organize their business around the patent, often creating large inter-corporate networks based on long-term contracting. As a result, by mixing legal monopoly and inter-corporate arrangements into one killer compound, price-based competition can be severely damaged, if not precluded altogether.

Not surprisingly, some world-class economists have strongly criticised this IP linkage to trade. As Jagdish Bhagwati frames it, IP rights were incorporated into the WTO, as one of three legs of a tripod, the other two legs being the traditional GATT and the GATS, for trade in goods and trade in services respectively:[46] as a result, the WTO became a tripod with three legs: two legitimate ones (GATT and GATS) and one illegitimate one (TRIPs). According to this economist, the process by which these trade-unrelated issues turn into trade-related matters is a cynical one.[47] With the conclusion of the Uruguay Round, as Bhagwati explains, an 'astonishing capture' took place: 'for virtually the first time, the corporate lobbies in pharmaceuticals and software had distorted and deformed an important multilateral institution, turning it away from its trade mission and rationale and transforming it into a royalty collection agency'.[48]

The basic motive for bringing IP issues into WTO instead of WIPO, as T.N. Srinivasan also recalls along similar policy lines, was the availability of the WTO's dispute settlement and trade sanctions mechanism for enforcing IP rights.[49] For Srinivasan, bringing IP rights issues into the WTO was 'a colossal

46 J. Bhagwati, *In defense of globalization*, op.cit.p.183.

47 J. Bhagwati, *Termites in the world trading system: How preferential agrements undermine free trade* (Oxford University Press 2008) at 71–72.

48 See J. Bhagwati, *In defense of globalization*, op.cit.pp.182-183 and J. Bhagwati, 'Letter to the Financial Times on Intellectual Property Protection' (14 February 2001).

49 See T. Srinivasan, 'Developing countries and the multilateral trading system after Doha, Center Discussion Paper Nº 842, Economic Growth Center (February 2002) at 9–10

mistake'. As Shrivasan recalls, the conventional argument in favor of world trade liberalization is that its gains outweigh losses from progressive liberalization, so that, in principle, a transfer scheme within each country can be devised to readjust and compensate the losers; however, most of the gainers from TRIPS are in rich developed countries and only a few, if any, are in poor countries.[50] This being the case, and even if gains outweigh losses, international transfers would be needed to compensate losers; but no such transfer to losers from the gainers is envisaged within TRIPS, in the sense of redistributive mechanisms to compensate the global exercise of IP rights.[51]

In short, it could be argued that the TRIPS agreement implies an unrestricted transfer of royalties from user (poor) to producer (rich) countries. In principle, however, as Robert Howse puts it, there is no particular reason to believe on the basis of standard economics –using Kaldor-Hicks efficiency– that increasing IP protection will increase aggregate domestic welfare.[52] For this reason, so many observers publicly denounce that the future benefits of the TRIPS agreement to developing countries, if any, are uncertain, while the present costs remain concrete. In the very first estimates for the World Bank by Keith Maskus, the full implementation of TRIPS already involved a world transfer of $8.3 billion moving to a few developed countries from the remaining nations.[53] While the figure could go up or down, it is clear that highly significant south-north transfers of rents are legally entrenched in the global economy through implementation and enforcement of the TRIPS agreement.

International IP protection is for most poor countries, as Bhagwati explains, 'a simple tax on their use of knowledge, constituting therefore an unrequited

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and T. Srinivasan, 'The TRIPS Agreement', *The Political Economy of International Trade Law: Essays in Honor of Robert Hudec* (Cambridge University Press 2002) at 343–348.

50 T. Srinivasan, *Developing Countries and the Multilateral Trading System: GATT, 1947 to Uruguay Round and Beyond* (Westview Press 1998).

51 See T. Srinivasan, 'The TRIPS Agreement: A Comment Inspired by Frederick Abbott's Presentation', Department of Economics, Yale University (29 November 2000) at 3 (mimeo).

52 See R. Howse, "From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime" 96 *American Journal of International Law* (2002): 102.

53 K. Maskus, *Intellectual Property Rights in The Global Economy* (Institute for International Economics 2000).

transfer to the rich, producing countries'.[54] In this regard, as conventional economic literature suggests, MFN-based trade produces positive efficiency effects without significant redistributive effects. By contrast, following Panagariya, non-trade agendas such as that of the TRIPS agreement produce efficiency effects of a dubious nature as well as large redistributive effects that often benefit rich countries at the expense of poor countries.[55]

In addition, TRIPS disciplines are now used as a lever by industry lobbying in order to produce regulatory chilling effects on domestic policies of developing countries in a wide variety of areas, including pharmaceuticals. Thus, for example, despite the fact that the TRIPS agreement can be fairly interpreted to generously accommodate compulsory licensing and domestic production of generics under patents held by foreign companies, the global pharmaceutical industry more often than not sucessfully opposes domestic policies in this direction by using proxy states to build on TRIPS, as well as going beyond that, negotiating TRIPS-plus disciplines. On the other hand, as Panagariya suggests, the argument that TRIPS agreement spurs global innovation to the benefit of all is also questionable; in this regard, trade-related IP promises to lower the welfare not just of developing countries but the world as a whole and, as such, it is an efficiency reducing, redistributive exercise.[56]

As Bhagwati explains, the optimal patent period must reflect a balance of two forces: on one hand, the protection provided by IP rights provides an incentive to innovate; on the other hand, it slows down the diffusion of benefits to potential users. However, patents have been uniformly extended to 20 years through TRIPS rules, a period so long that it cannot be called efficient at balancing those forces;[57] particularly if we also take into account that this temporal protection applies multilaterally. In addition, the minimum temporal protection established in the TRIPS agreement can now be ratcheted up through TRIPS-plus schemes. By now, inventions under patent are legally protected for 20 / 7300 days in article 33 of the TRIPS agreement. In this context, a first

54 J. Bhagwati, 'Letter to the Financial Times on Intellectual Property Protection' (February 14, 2001).

55 See A. Panagariya, 'TRIPs and the WTO: An Uneasy Marriage', *Paper presented at WTO Seminar* (July 20, 1999) at 2.

56 Ibid: 2.

57 J. Bhagwati, *In defense of globalization*, op.cit.p.184.

important question is why we are granting those 7300 days of monopoly protection to inventions; after all, no scientific data-driven deliberative process has taken place regarding such a standard of IP time frames: the figure was decided rather liberally by trade delegates, who basically assumed with the advice of some US companies that 7300 days was an appropriate time frame; a figure reached by adding 1095 days to the patent terms which had been in force in the United States since 1861 (17 years). As Bhagwati bluntly but clearly depicts, understandably, 'few believe that the optimum IPR is zero; and so do few believe that it extends as high as the 20-year patent rule' forced into the WTO by business lobbies'.[58]

In principle, it is reasonable to argue that there is no such a thing as one universally optimum level of IP protection for all states.[59] However, IP linkage to trade has produced significant incentives for capital-holders to move increasing volumes of investment to IP stock and trading. As explained, IP owners are now potentially able to vertically enforce standardized IP for 20 years in at least 160 potential jurisdictions: this, it is no accident that investor expectations on the financial performance of IP companies have increased in recent years, as a natural result of the lobby-driven ratcheting up of IP standards.

In consequence, the TRIPS agreement produces two basic transformations on the critical regimes of world trade and financial markets, respectively. Firstly, as for world trade, the IP linkage to trade subjects world trade in goods and services built in proprietary technologies to monopoly trading as mentioned above, as access is segmented along the exclusionary lines of 160 territories in which any IP-related transaction is governed by the patent holder. Secondly, as for financial markets, the linkage of IP to trade transforms these monopolies into highly tradable and liquid properties, and contributing to expand the capitalization of industries playing the game of intangible propertization. Therefore, as the combined structure of incentives of financial markets, together with IP linked to world trade allows a multi-jurisdictional enforcement of property rights over any given intangible, it is fair to conclude that a first truly global property has been created in recent decades.

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58 J. Bhagwati, 'Economic Freedom: Prosperity and Social Markets (Key Note Speech)', *Economic Conference on Economic Freedom and Development* (Tokyo, 17-18 June 1999).
59 See P. Drahos, '"IP World", op.cit.p.p.199.

The propertization of intangibles has become an optimum legal form of profit maximization, as not only can it be vertically controlled but also limitlessly expanded world-scale. In this sense, property within TRIPS disciplines differ in two essential ways from traditional tangible properties: on the one hand, a standardized abstract form of property can be potentially enforced globally, as explained; on the other, it can be limitlessly produced through the patent offices of the world, which currently tend to be managed with industrial productivity criteria. Therefore, patents nowadays function as a sort of super-asset which is liquid and fully enforceable worldwide: in short, a highly tradable globalized property in its own right, the value of which is disclosed today in the mandatory financial information anchored to publicly traded companies and stock. As a result, the traditional K-10 and 10-Q like-forms within securities markets do index and measure IP –stock of companies with strong IP-portfolios– as intangible property and productivity provides critical 'material information' for investment decisions in financial markets. Paradoxically, because it is information and knowledge that allows financial markets to work efficiently, the new 'financial materiality' of IP linked to trade has also shifted some investment preferences towards IP-based business models.

In the pre-TRIPS scenario, most of a company's value was its monetary, tangible and fixed assets. Nowadays, these assets are often replaced within corporate strategies by patented technologies and other IP forms. Intangible assets are thus moving at the core of corporate market value, and are reflected in stock value; by means of stock exchanges, these government-sponsored monopolies are –ironically– re-embedded in a market –financial markets– and thus too cursorily legitimized as market-driven assets.

IP has thus moved to the core of the corporate competitive advantage; as IP has become a dominant asset in global business transactions.[60] As a result, exclusive rights over knowledge and information are subject to patent productivity programs, strategic buying and selling of IP portfolios as well as IP-focused mergers and acquisitions.[61] Arguably, the companies that man-

60 R. Parr, *Royalty Rates for Licensing Intellectual Property* (John Williams & Sons 2007) at 22.

61 See C. Fisk, 'Removing the 'Fuel of interest' from the 'fire of the genius': law and employee-inventor, 1830–1930', 65 *University of Chicago Law Review* 4 (1998): 1127–1198. On the move to include corporations as inventors see also J. Boyle, *Shamans, Software,*

aged to get TRIPS on board in the Uruguay Round probably had not expected to create a global transformation of such dimensions. It is not by chance that multiple companies are shifting their business models, or elements thereof, to IP.

4. Power of world licensing

Monopolization is a black letter illegal practice in all jurisdictions of the world. Virtually all economics textbooks explain why monopolies are socially inefficient. Nonetheless, reaching the world monopoly premium is legally possible through IP. Over the last century, market, competition and efficiency have provided a powerful cosmovision for our increasingly interdependent world. However, as we climb the ladder of proprietary technologies, these drivers of the market economy are under stress, as all things and activities that can be imbued with traces of IP in the present day can be monopolistically produced and/or distributed worldwide. Not only patent holders can exercise full control over the free movement of goods and services, and thus on world production and distribution; as IP architectures are built on territorial modules –so-called market exclusivity–, virtually an infinite combination of contractual schemes allows the patent-holder to act as a private regulatory authority on the use and access to proprietary technologies.

Arguably, it would be difficult to dream up a more autonomy-enhancing legal vehicle from the perspective of profit maximization. In part for this reason, anti-competitive inter-corporate arrangements built on IP had already become a systemic problem early on, in the 20th century, and thus before IP linkage to trade at the end of that century. In the 20s and 30s, for example, the US chemical industry would intensively use IP within its global inter-company cooperative activities, following the practices of the German chemical industrial complex.[62] The US industry learnt from German industry that patents were matchless instruments of business domination, as Drahos and Braithwaite recall. Thus, in subsequent years, the patent profession put energies into perfecting the use of this instrument, in particular because

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and Spleens: Law and the construction of the information society (Harvard UP 1996).

62 See eg. A. Greenberg, 'The Lesson Of The German-Owned US Chemical Patents', 9 *Journal of the Patent Office Society*, (1926–27): 19–20.

much denser legal schemes were needed to hide cartels from the eyes of competition lawyers, after cartels began facing the prospect of criminal prosecution under the Sherman Act of 1890.[63] One among the most influential individuals who envisioned the power of IP and promoted its use in global inter-corporate arrangements was Edwin Prindle (1868-1948), former high ranking patent official until 1899 and later Chairman of the Patent Committee of the American Chemical Association:[64]

'Patents are the best and most effective means of controlling competition. They occasionally give absolute command of the market, enabling their owner to name the price without regard to cost of production. . . The power which a patentee has to dictate the conditions under which his monopoly may be exercised has been used to form trade agreements throughout practically entire industries, and if the purpose of the combination is primarily to secure benefit from the patent monopoly, the combination is legitimate. Under such combinations there can be effective agreements as to prices maintained.'[65]

In the words of this legal entrepreneur, 'a patent is the most perfect form of monopoly recognized by the law'.[66] Prindle and other patent lawyers argued convincingly that patents were heavy hitters for legally allowing companies to fix price, control production and divide territories among themselves, as patent-based inter-corporate arrangements (eg. patent sharing) could often function as a robust legal shield against antitrust enforcement actions. In this context, as Drahos and Braithwaite explained, restrictions over price and production could form part of patent license arrangements, so the use of such arrangements was able to often frustrate the intent of the Sherman Act, as IP-based cartels were more easily regarded by courts as a mere exercise of property rights.[67] Interestingly, the companies participating in the IP-based chemical cartels of the 20th century were among the first to become genuinely global: early on in last century, as these scholars explain, they learnt to use IP forms to bind themselves together into dominant groups operating across borders according to agreed terms and conditions.[68]

63 P. Drahos & J. Braithwaite, *Information feudalism*, op.cit.p.57.

64 See E. Prindle, 'The marvelous performance of the American patent system', 10 *Journal of the Patent Office Society* (1927–28): 255 and 258.

65 See D. Noble, *America by Design* op.cit. p.89.

66 E, Prindle, 'The Art of inventing', *paper read at the 23d Annual Convention of the American Institute of Electrical Engineers*, Milwaukee (May 28-31, 1906) at 1.

67 P. Drahos & J. Braithwaite, *Information feudalism*, op.cit.p.51.

68 P. Drahos & J. Braithwaite, *Information feudalism*, op.cit.p.57.

IP-based global corporate arrangements are not a recent development in global economic governance, nor have they been an issue lacking policy awareness and concern until recent years. In fact, anticompetitive practices in this area have been one of the most efficient means of isolating corporate autonomy from market and society already since the beginning of the last century. However, only by the end of the 30s did the US antitrust authorities begin paying attention to the distorting economic and social impact of global cartels generally, and thus also those based on IP assets. In this regard, at the time of the enactment of the 1890 Sherman Act, international cartels were not still framed in negative terms either by US economists, politicians or judges. At that time, the market economy was still an ongoing conceptual endeavor, and basically thought to be a sole domestic endeavor. Within this context of economic nationalism, antitrust law and policy would mainly prohibit and bust domestic but not international cartelization. As a result, for decades, the latter would be a viable legal device for companies to do business. In fact, the Webb-Pomerene Act of 1918 formally legalized export cartels originating in or joined by US companies as long as these did not have the above mentioned adverse effect on the domestic economy.[69] In the meantime, IP would gain considerable pre-eminence over many of those cartels.

The change in public attitude towards global cartels under the Roosevelt administration was brought about, right after Second World War, by the US Antitrust Division led by the forceful Assistant Attorney General Thurman Arnold.[70] However, world anti-competitive arrangements around IP would not only be difficult for domestic authorities to scan but also to break up, as the power-laws of property and contract –patent as property, and license as contract– tend to generally operate as a legitimizing chain that grants a presumption of legality to many of those arrangements. Traditionally, domestic authorities face some hurdles acting against contractual relationships and thus tend to intervene with relative unease when framing IP arrangements as anti-competitive practices; and those difficulties increase when the intercorporate arrangement is globalized. For this reason, more often than not, public authorities and courts have tended to leniently interpret IP-based anticompetitive arrangements as mere exercises of property rights, and thus as

69 See E. Hawley, *The New Deal and the problem of monopoly: a study in economic ambivalence* (Princeton University Press1966).

70 See T. Arnold, *The folcklore of capitalism* (Beard Books 2000).

practices circumscribed by freedom of contract. Thus, a brief exploration of the contract-side is required, as licensing contracts are protected in the laws of all WTO Members by means of TRIPS standards: 'patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts' (article 27.2). In this regard, firstly, the patent-holder exercises a government-sponsored monopoly, and thus the right of outsourcing its exploitation through license; secondly, the licensee enters into an agency relationship with the patent-holder in one or more domestic jurisdictions. As a result, exclusive licensees are also among the winners in the IP game.

As the patent-holder has the power to segment access to the invention in all territories, any IP-pollinated goods and services –and thus their physical presence in those territories– can be controlled through licensing and related third-party policing. In this context, some licenses are often foundations for long-standing intercompany bonds based on long-term contracting. The basic strategy routinely using IP for segmenting global markets is a simple one, as Drahos and Braithwaite explain: it requires coming to an exclusive licensing arrangement with an agent in a country, working out a price that the market will bear and using IP rights to prevent anyone other than the exclusive agent from importing the same *legitimate* product that has been released by the IP owner more cheaply in another place on earth.[71]

Evidently, the most efficient means to effectively balance the increasing power of IP in society today is antitrust law and policy.[72] In this regard, antitrust law and policy provides formidable regulatory leverage. Competition law and policy generally trumps IP law and policy, as the market-economy tends to be framed as an overarching and structural value of contemporary societies. As a result, anticompetitive behaviour such as excessive pricing, exorbitant royalties, denial of negotiation of voluntary licenses (eg. patent-based standards) among others could be effectively busted by antitrust authorities worldwide.

71 P. Drahos & J. Braithwaite, *Information feudalism*, op.cit.p.36.

72 See generally, G. Ghidini, *Intellectual Property and Competition Law: The Innovation Nexus* (Edward Elgar 2006) at 99–118 (chapter 5), E. Fox, 'Can Antitrust Policy Protect the Global Commons from the Excesses of IPRs?', *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge University Press 2005) and, particularly, N. Gallini & M. Trebilcock, 'Competition policy and intellectual property rights' *Competition policy and intellectual property rights in the knowledge-based economy* (University of Calgary Press 1998) at 17–61.

In this regard, the TRIPS agrement provides a great deal of latitude in terms of how countries implement it.[73] In fact, the Uruguay Round negotiators left TRIPS disciplines open and generous in their wording on antitrust for that very reason.

Notwithstanding the fact that WTO law still lacks competition disciplines such as those originally conceived for the failed Havana Charter, in its groundbreaking chapter on restrictive business practices,[74] the antitrust principles contained in article 8.2 of the TRIPS agreement, within Part I ('General Provisions and Basic Principles'), expressly establish that *appropriate measures* may be needed 'to prevent the abuse of intellectual property rights by right holders or the resort to practices *which unreasonably restrain trade*' (author's italics). In this regard, the balance between exclusivity (patents as legal monopolies) and the public interest is generally considered to be provided through the subtle interplay of TRIPS article 30 ('Exception to rights conferred') and 31 ('Other use without authorization of the right holder') within TRIPS Part II ('Standards concerning the availability, scope and use of Intellectual Property Rights'). It is through this interplay that TRIPS-consistent policy options are conventionally defined, as article 30 details substantive criteria for exceptions to exclusivity, and article 31 contains a list of procedural requirements to limit that exclusivity. In this context, to pick one significant example, TRIPS article 31.k expressly allows the issuance of CLs to remedy anti-competitive practices of patent holders.

In addition, two extra provisions grant further TRIPS flexibility with regard to antitrust practices generally: article 40 regarding licensing within Section 8 ('Control of anti-competitive practices in contractual licenses') in TRIPS Part II; and article 44 regarding injunctions within Section 2 ('Civil and administrative procedures and remedies') in TRIPS Part III ('Enforcement of intellectual property rights'). Thus, according to article 40.2, WTO Members have full regulatory autonomy to define what may be deemed an anti-competitive conduct: '[n]othing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particu-

73 See B. Hoekman, 'Strengthening the Global Trade Architecture for Development: The Post Doha Agenda' (The World Bank 2001) at 231.

74 See W. Diebold, 'The End of the ITO', 16 *Essays in International Finance* (October 1952) and A.Wilcox, *A Charter,* op.cit.

lar cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market'. In this context, following with the example, compulsory licenses issued under Part III are not bound by the restrictions on exports under CLs granted under article 31.f of the TRIPS.

Therefore, the antitrust provisions of TRIPS offer sufficient legal and policy space for effectively busting global anticompetitive practices based on IP. Those articles offer developing countries ample 'wiggle room' to implement IP-related policies favouring the public interest through free competition.[75] By doing so, competition agencies can not only remedy exorbitant contractual terms and royalties imposed on licensors, or refusals to negotiate voluntary licences but, as mentioned, excessive prices imposed on consumers for essential knowledge and technologies. In the post-Uruguay Round scenario, in consequence, antitrust authorities still enjoy enough leeway at deploying a wide variety of remedies against IP-based anti-competitive practices, including the issuance of compulsory licenses.

Needless to say, some global licensing arrangements in scientific and technological areas can be legally interpreted as constituting IP-based cartels and therefor should be seriously prosecuted by concerted antitrust enforcement action. After all, some licensing arrangements still do exactly the same things that old-school commodity cartels did: they often divide up territories, control production and fix prices. As explained, competition can be inhibited or even elimitated, for example, by networking essential technological patents territorially and aggresively defending them in the domestic courts of the world. In fact, nowadays, large corporate licensors with strong IP portfolios together with their strategic licensees not only strategically employ legal injunctions in multiple jurisdictions against the use of essential proprietary technologies. In addition, some companies also hinder and/or delay the negotiations of voluntary licenses in standard essential patents (SEPs), among other illegitimate legal tactics to improve competitive advantage.

However, antitrust authorities from technology-exporting countries are up-scaling their surveillance over inter-corporate negotiations and decisions

75 J. Reichman, 'From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement', 29 *New York University Journal of International Law and Politics,* (1996): 28.

regarding voluntary licensing of technology, and are now intervening in 'licensing transactions' related to essential patents as well, by increasing the pressure on companies to negotiate fair voluntary licenses for essential technologies within standard setting organizations (SSOs). Paradoxically, however, concerted inter-state antitrust regulatory action and enforcement in this area area –IP and competition– is today still nascent at best. Given this state of affairs, increased global action against both *vertical* (e.g. exclusive licensing) and *horizontal* (e.g. cross-licensing) arrangements based on IP would be advisable. Unfortunately, we still do not see much concerted anti-cartel global enforcement action with regard to IP-based global licensing, not to say the development of multilateral antitrust disciplines on this area.[76] The challenge is more than evident. Nonetheless, cartels are the area in which antitrust authorities from developing and developed countries alike have a deeper shared understanding; and in fact, the most successful workshops within the International Competition Network (ICN) are those of international cartel-busting, every year.[77] Thus, we should not exclude eventual positive shifts in policy direction: fortunately, there is also sufficient disagreement on the relationship between competition policy and intellectual property to provide public authorities with significant space within which to manoeuvre.[78]

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76 On this critical issue for economic and non-economic global governance alike see P. Marsden, *A Competition Policy for the World Trade Organization* (Cameron May, 2003) and M. Taylor, D. *International Competition Law: A New Dimension for the WTO?* (Cambridge University Press 2006).

77 See M. Djelic & T.Kleiner, 'The international competition network: Moving towards transnational governance', *Transnational Governance: Institutional Dynamics of Regulation* (Cambridge University Press 2006) at 287–307, W. Kovacic & H. Hollman, 'The International Competition Network: Its Past, Current and Future Role' 20 *Minnesota Journal of International Law* (2011): 274–323 and W. Kovacic, H. Hollman & A. Robertson 'Building Global Antitrust Standards: The ICN's Practicable Approach', *Research Handbook on International Competition Law* (Edward Elgar 2012) at 89–109.

78 J. Berger, *Advancing public health by other means: using competition policy to increase access to essential medicines,* Bellagio Series on Development and Intellectual Property Policy: Policy Options for Assuring Affordable Access to Essential Medicines (ICTSD 2004) at 4.

6

Transforming public institutions into market niches

1. Procurement as outsourcing

The WTO Agreement contains several so-called 'plurilaterals' in its annex 4, which are not binding on all members but on those who are party to them. The Government Procurement Agreement (GPA) is one of the plurilaterals within this annex, and an illustrative example of steady regulatory trends towards market-formation in all areas of society, including the tasks and activities originally performed by public authorities (e.g. communication infrastructures, education, health, etc). It is no accident that, nowadays, government procurement offers a highly attractive market niche for global companies: in short, states as market niches. In fact, the so-called 'procurement markets' account for approximately 13% of the gross domestic product (GDP) and 29% of general government expenditures of the OECD countries.[1]

Both the number and volume of these contracts are steadily increasing, generally involving not only goods but services. In addition, the business opportunities of this emerging global 'market' are quite significant, as only 25% of government procurement contracts are currently subject to international disciplines. In this context, globalized companies lobby host and home-state governments for increased "market access" to their procurement activity. Today various international regulatory initiatives establish disciplines ensuring that procurement contracts above certain economic thresholds are awarded in competitive, transparent and non-discriminatory conditions between local and foreign companies. Thus far, the WTO is the most relevant initiative in this regard.[2] In fact, According to the WTO Secretariat estimates, coverage of

1 See 'Size of Procurement Market', *Government at a Glance* (OECD 2013) at 132.

2 The ten Parties that have currently accepted the Protocol to amend the GPA are Liechtenstein; Norway; Canada; Chinese Taipei; the United States; Hong Kong China; The European Union; Iceland; Singapore and Israel.

government procurement subject to the GPA amounts to 600 billion Euros annually: 500 billion Euros per annum, pursuant to the 1996 GPA, and a further 80-100 billion with entry into force of the 2014 GPA.[3]

The opening up of government procurement to foreign competition under common disciplines expands a new regulatory paradigm for governmental activity based on 'less rowing' and 'more steering'.[4] The basic policy discourse around these initiatives aims to transform economic efficiency and best value for money into the main legal criteria in government procurement decision making (e.g. articles 7 to 16 of the GPA). In this context, procurement policies targeting other social values –such as environmental protection, job creation, local or regional development, etc– tend to be increasingly framed as secondary procurement policies.[5] The critics question these conceptions, by arguing that these disciplines reduce the capacity of public authorities to use procurement for pursuing other alternative and socially valued objectives.[6] In addition, they also argue that in the long term, government entities and public officials may reduce technical capacities and practical expertise on the ground in all key policy areas, thus compromising the quality and stability of publicly provided services, by means of the structural outsourcing of their tasks and activities. In short, so-called 'learning by doing' is intensely connected to 'knowing by doing'. On the other hand, the globalization of procurement markets globalizes conflicts of interests as well. As government representatives and high-level officials currently move from industry to government, and back again, policy biases towards the structural outsourcing of publicly provided services (i.e. health and education, etc) can be embedded within major government policy decisions.

In any case, developed countries are pushing the forward button, and promoting new regulatory frameworks aimed at reforming government procurement

3 See GPA/121, *Report (2013) of the Committee on Government Procurement (24 October 2013)* at 2.

4 See D. Osborne & T. Gaebler, *Reinventing government* (Addison-Wesley 1992).

5 See S. Arrowsmith, 'Horizontal Policies in public procurement: a taxonomy', 10 *Journal of Public Procurement* (2010): 149–186.

6 See, in general, C. McGrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press 2007) y P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement* (Oxford University Press 2004).

along the lines of the aforementioned criteria. For example, the World Bank fosters cooperation and technical assistance programs, collaborating with the OECD through a joint initiative to strengthen the capabilities of developing countries in this sector, as well as assessing domestic initiatives for procurement reform.[7] In this regard, the decades-old OECD program on procurement aims to remove trade restrictions and promote competition and market performance in this sector.[8] Interestingly, UNCITRAL is also contributing to these initiatives, and its Model Law on government procurement does currently offer a template of 'good practices' for domestic law and regulation in this area.[9] Last but not least, some regional policies stand out within procurement reform initiatives. The European Union, in particular, has carried out major and extensive work in the area of procurement reform and market-formation.[10] As a direct result, the EU directives and regulations on government procurement provide the EU DG Trade for a bargaining chip to obtain trade concessions from other GPA Parties in procurement negotiations. Thus, basically, government procurement has become a burgeoning area of global governance.

Traditionally, WTO plurilateral agreements such as the Agreement on Trade in civil aircraft, the International Dairy Agreement, the International Bovine Meat Agreement, or the GPA itself, have not attracted much academic, media and public attention compared to the multilateral agreements (eg. GATT, GATS, TRIPS). However, some of these plurilateral agreements are increasingly important; and this is particularly the case of the revised GPA.[11] The

7 See Joint OECD-World Bank Round Table Initiative as well as Country Procurement Assessment Reports (CPAR).

8 For an example of OECD's early and innovative initiatives in this field, see for example, *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* (OECD 1995), *The OECD Report on Regulatory Reform* (OCDE 1997) as well as its action program.

9 See R. Hunja, 'The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform', *Public Procurement: Global Revolution* (Kluwer Law International 1998), pp.97-107 and S. Arrowsmith, 'Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard', 17 *International and Comparative Law Quarterly* 18 (2004): 17–46.

10 See C. Chinchilla Marin, *Public Procurement in the European Union and its Member States* (Lex Nova 2012).

11 See for example, S. Arrowsmith, 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha', 5 *Journal of International Economic Law* (2002): 761–790.

revised GPA entering into force in April 2014 is a paradigmatic example of the aforementioned emerging procurement markets. The new agreement substitutes the 1996 GPA resulting from the Uruguay Round (1986-1994) for all the 1996 GPA parties that have accepted its Protocol of Amendment. Essentially, the new GPA is the last of a wide variety of policy initiatives within GATT for the progressive opening up of government procurement to foreign competitors, which began with the negotiations within the Tokyo Round (1973-1979) for a Code on Government Procurement, which entered into force on 1 January 1981, and originally aimed at correcting the non-applicability of GATT rules to this sector.[12] Against this background, the following pages contextualize and explore the disciplines and coverage of the new revised GPA.

2. The game and its players

The GPA functions as a rule-based infrastructure for global procurement markets. To date, 43 Members of the WTO are parties to the GPA: Canada, the European Union (28 member states), Korea, United States, Hong Kong China, Iceland, Israel, Japan, Norway, the Netherlands, Singapore or Switzerland, Taipei China, among others.[13] The GPA has also recognized 23 observers, and 9 of these, including the People's Republic of China, are negotiating accession. Of the 22 GPA observers, WTO Members such as China, India, Australia and Turkey are notable for the volume and potential of their procurement sector. In addition, the protocols for WTO accession of 6 of these GPA observers including the Russian Federation and Saudi Arabia, are contemplating GPA accession.[14]

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12 See generally J. Bourgeoise, 'The Tokyo Round Agreement on Technical Barriers to Trade and on Government Procurement in International and EEC Perspective', 19 *Common Market Law Review* 5 (1982): 1157–1244 and see A. Blank & G. Marceau, 'The History of the Government Procurement Negotiations Since 1945', 5 *Public Procurement Law Review* 77 (1996): 77–147.

13 For accession negotiations see Doc GPA/*.

14 On the market value of new accessions, see R. Anderson, A. Müller, P. Pelletier & K. Osei-Lah, 'Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and An Evaluative Framework for Individual WTO Members Considering Accession', 21 *Public Procurement Law Review* 3 (2012):113–138.

The basic principles of the GPA are non-discrimination, transparency and procedural fairness. The GPA regulates basic disciplines for the procurement of goods and services by central government, sub-state entities and state-owned enterprises in respect of which, each GPA Party has scheduled market-access commitments. In essence, this agreement establishes a minimum general standard for undertakings relating to tendering procedures covered by its rules (e.g. regional airport services, transport infrastructures, tenders by state-owned enterprises, etc).

The GPA Parties are required to grant 'treatment no less favorable' than that accorded to domestic products, services and suppliers (article 3.1). Similarly, they may not treat any foreign based supplier less favorably than a locally-established supplier on the basis of 'degree of foreign affiliation or ownership'; nor may they discriminate against locally-established suppliers 'on the basis of the country of production of the good or service being supplied' (article 3.2). The regulatory objective is to ensure that foreign suppliers have equal access and opportunities in government procurement of goods and services. To achieve this, the following basic requirements have been established: (1) minimum time limits to prepare, submit and receive tenders, (2) requirements for tender specifications, (3) procedures for submission, receipt and opening of tenders and awarding of contracts and (4) criteria for awarding contracts.[15] In this respect, GPA rules prescribe procedural requirements for three basic types of tenders: (a) *open tendering procedures*, (b) *selective tendering procedures,* in which suppliers are invited to submit a tender with conditions of participation linked to the ability to complete the contract as well as (c) *limited tendering procedures*.[16]

The scope of application or coverage of the GPA is determined with regard to each Party in its Appendix I (also referred to as each Party's 'schedule'). In this regard, Appendix I contain details of the contracting entities which are subject to GPA as well as minimum threshold values for the public tenders. Within this appendix, the coverage for each GPA Party is determined in Annex 1 (central government entities), Annex 2 (sub-central government entities), and Annex 3 (all other entities procuring in accordance with GPA) as well as Annex 4 (covered services) and 5 (covered construction services).

15 See articles 11.2, 12, 13.1-3 and 13.4 respectively.

16 See articles 7.3(a), 7.3(b) and 10, as well as article 15.

In principle, services are only incorporated in the two final annexes of the aforementioned Appendix I. However, some WTO Members have also consigned services undertakings to Annexes 1, 2 and 3. The other appendices include publications in which the Parties insert advertisements for public contracts (Appendix II), permanent lists of qualified providers for selective tenders (Appendix III) as well as regulations and domestic procedures on government procurement (Appendix 5). These appendices are designed to easily formalize regular changes and updates.[17] In regard to these, rectifications, transfers of entities from one annex to another or amendments are subject to so-called 'compensatory adjustments' as well as WTO dispute settlement mechanism (articles XXIV.6.a).

The GPA also encourages participation and increased transparency in procurement.[18] However, it concentrates mainly on disciplining large-scale procurement in general. In this respect, its provisions are only applicable to public tenders with values exceeding specific thresholds (article I.4).[19] On one hand, the threshold value for goods and services procured by central government entities is 130,000 Special Drawing Rights (SDR);[20] currently, that figure equates to 185,000 US dollars. On the other, the threshold value for contracts entered into by sub-central government entities varies. In general, it is situated at around 200,000 SDR with some 400,000 for procurement by state-owned enterprises. With construction contracts, the figures rise to 5 million SDR. In short, the GPA's approach to procurement tends to favor the 'macro' over the 'micro' and thus generally involves large companies and large numbers.

Compliance with the GPA disciplines is promoted through an (1) effective inter-state monitoring system, within WTO Government Procurement Committee, (2) the enforcement of binding rules for domestic review procedures, so that foreign bidders can appeal contracting decisions and obtain reparation, and (3) access to the WTO dispute settlement. With regard to the first point,

17 See WTO/LET/*.

18 Differences in coverage vary in intensity. For an interesting study on the relative impact of the GPA in the US, see C. Tiefer, 'The GATT Agreement on Government Procurement in Theory and Practice', 26 *University of Baltimore Law Review* (1997): 31–50.

19 On methods of notification for threshold values see Doc WTO GPA/1, Annexe 3.

20 IMF assesses the daily value which is based on the stock market exchange rate of four currencies (US dollar, Euro, pound sterling and Japanese yen).

the GPA regulates transparency of laws, procedures and practices on government procurement as well as the technical specifications of the tenders. In addition, tendering procedures are required to include accessible publications identified in Appendices II to IV (article IX). The GPA thus imposes a general obligation to publish applicable laws, court decisions and administrative rulings of general application, as well as any procedure (including standard contract clauses) regarding government procurement (article XIX.1). At the same time, Parties to the agreement are required to submit annual statistics (broken down into categories of products and services) on the number and estimated value of the tenders awarded to both domestic and foreign suppliers.[21] Each GPA Party is also required to collect and provide the Committee on Government Procurement, on an annual basis, with statistics on its procurement covered by the rules (article XIX.5).

The GPA also determines the publication and right of foreign tenderers to obtain information on positive or negative decisions on the award of tenders (article XVIII.1 and 2). This obligation is complemented by the right of the bidder's country of origin to request additional information; such procedural guarantees are established to ensure that procurement decisions are based on 'fairness' and 'impartiality' (article XIX.2). In addition, the provisions of the GPA also establish a general requirement for its Parties to deliver regular notifications regarding the evolution of their domestic procurement rules and practices. In this respect, Member States are required to notify any modification to procurement regulations and practices (article XXIV.5(b)1).[22] In addition, modifications to the appendices can be objected to by other Parties, and are also regularly monitored by the Committee on Government Procurement, which supervises eventual compensatory adjustments pursuant to article XXIV.6(a).[23]

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21 See Doc WTO GPA/*, *Statistics for [20**] reported under article XIX:5 of the Agreement*.

22 See Doc WTO GPA/1/Add.1. *Procedure for notification of national implementing legislation*, Committee Decision of 4 June 1996, (27 June 2006) and, for example, Doc WTO GPA/20, *Notification of national implementing legislation–European Community Communication* (28 January 1998) and review Doc WTO GPA/32, *Examination of Applicable National Legislation in European Union* (12 January 2000).

23 For an example regarding the last EU proposals of modification and the US objections see GPA/MOD/EEC/23 (24 March 2011) and GPA/MOD/EEC/24 (5 April 2011).

In this context, the WTO Secretariat has recently been involved in a project for turning the appendices into online tools, to provide governments and businesses (as potential tenderers) with interactive information regarding procurement. The so-called 'e-GPA project' aims at creating an integrated database comprising information on market access schedules, statistical reports and links to the GPA Parties' procurement sites, to serve as a 'market information tool'.
With regard to domestic procedures, article XX of the GPA requires that domestic legal systems set up procedures enabling suppliers to challenge alleged breaches of the agreement through judicial review. The domestic judicial body with competence for this purpose should operate according to a series of procedural requirements (article XX.6.a-c), and shall be authorized to determine the correction, compensation (restricted to costs of tender preparation or protest) as well as rapid interim measures to correct GPA breaches and thus to preserve commercial opportunities (article XX.7, a-c).

Ultimately, GPA rules are under the jurisdiction of the WTO dispute settlement system in accordance with article XXII.1. Therefore, WTO panels and the Appellate Body are available to the 43 GPA Parties not only for solving their disputes through neutral third party adjudication but to authorize suspensions of GPA concessions as a result of non-compliance with GPA rules and standards. With regard to non-compliance, however, the GPA differs from the rest of the agreements covered by the WTO jurisdiction in some key issues. For example, non-compliance does not imply suspension of trade concessions or other obligations under WTO covered agreements. As the GPA is a voluntary agreement –whereas the GATT, the GATS and TRIPS are agreements of compulsory accession for all WTO members–, GPA Parties are not authorized to suspend trade concessions deriving from the GATT (goods), GATS (services) or TRIPS (IP) in order to respond to non-compliance with GPA provisions. Hence, the so-called crossed-retaliation between GPA Parties is circumscribed to the procurement sector.[24]

Currently, WTO dispute settlement regarding procurement is relatively scarce compared with other covered agreements. Arguably, the most significant controversy to date was that concerning public procurement of the State of Massachusetts, aimed at disciplining companies operating in Myanmar (Bur-

24 Article XXII.3 and 7.

ma) and promoting human rights in that country.[25] In addition, a US claim against procurement conditions for the construction of Inchon international airport in Korea was also resolved by a panel in 2000.[26] Previously, a dispute between the EC and Japan regarding a tender for a capacity extension in a Multi-functional Satellite *(*MTSAT*)* was settled.[27] Thus, there have been few procurement disputes to date within WTO.[28] Notwithstanding this fact, it is reasonable to expect an increase in the number of disputes in the midterm, as 10 new WTO Members are negotiating accession to the revised GPA, and in particular a further 24 states are negotiating accession to the WTO itself.

In order to accede to the GPA, a state is required to offer a list of undertakings which are acceptable for all 43 GPA Parties; when this occurs, the offer becomes part of Appendix I. For the purpose of GPA accession, the Committee on Government Procurement set up working groups to examine the scope of the offers as well as full information on opportunities for export of the applicant state.[29] Consequently, accession to the WTO will depend on acceptance by all its 160 members and, therefore, also by the 43 GPA Parties. As a result, as mentioned, some WTO accession negotiations are raising the issue of accession to the GPA; although paradoxically this is technically a voluntary accession. In this regard, negotiating GPA accession sometimes becomes a *sine qua non* requirement for some states to obtain the so-called 'entry ticket' to the WTO.

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25 See Doc WT/DS88/*, *United States–Measure affecting public procurement*.

26 Doc WTO WT/DS163/R, *Measures affecting public procurement (procurement practices of the Korean Airport Construction Authority)* (1 May 2000).

27 See Doc WTO WT/DS73: *Japan—Procurement of a navigation satellite* (3 March 1998) See also Doc WT/GPA/M/(18 February 1998).

28 Three *panels* have drawn up reports prior to creation of the WTO: *Value-Added Tax and Threshold* GPR/21 (16 May 1984) BISD 31/247, *United States Procurement of a Sonar Mapping System* (23 April 1992, not adopted) GPR.DS1/R and *Norwegian Procurement of Toll Collection Equipment for the City of Trondheim*. GPR.DS2/R (adopted on 13 May 1992) BISD 40S/319. For a comment on these three cases see F. Weiss, 'Dispute settlement under the "Plurilateral Agreements: the case of the Agreement on Government Procurement', *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International 1997) at 448–459. See also, *Dispute Settlement. World Trade Organization: Government Procurement* (UNCTAD 2003) at 24–29.

29 See WTO GPA/1, *Decisions in procedural matters within the framework of the public procurement agreement* (1994), Annex 2, paragraphs 2 to 4 (5 March 1996).

3. Expanding the discipline

In addition to the current disciplines, the 1996 GPA incorporated a Future Work Program, also so-called 'built-in agenda', aimed at expanding its sector coverage. The revised GPA of 2014 is a direct result of that agenda, significantly extending the scope of the previous agreement within the Annexes of the new Appendix I; drawn up within the 1996 GPA negotiating framework of article XXIV.7, the agreement was adopted in 2012 and has finally entered into force in April 2014. This updated version of the GPA is yet another by-product of treaty-based progressive liberalization.[30] In this regard, the revised GPA builds on the procurement regulatory experience initiated in the GATT Tokyo Round (1973-1979), and later followed by the GPA resulting from the Uruguay Round (1982-1994). Following decades of experience, the world trading system has finally reformed this regulatory framework in 2014. As a result, the revised GPA adds 4 complementary objectives to the traditional disciplines managed by the GPA of the Uruguay Round:

(1) Promoting the implementation of new procurement practices and methods, such as use of information technologies (*on line* tenders),
(2) extending the coverage of central (and sub-central) public bodies subject to the GPA,[31]
(3) eliminating some discriminatory measures which were not under the provisions of 1996 GPA,[32] and
(4) facilitating accession of new Parties by incorporating special and differentiated treatment (S&D) for developing countries.

Not surprisingly, the negotiations for the new instrument led by the Swiss, Nicolas Niggli, were particularly complicated. Beginning in 1997, it was only in 2006 that negotiators reached a provisional understanding on obtaining improvements in coverage of Appendix I for all the GPA Parties. In fact, negotiations regarding coverage (eg. public procurement in Canadian provinces

30 See in particular S. Arrowsmith & R. Anderson, *The WTO Regime on government procurement: past, present and prospects* (Cambridge University Press–WTO 2011).

31 See GPA/79, *Decision on modalities for the negotiations on extension of coverage and elimination of discriminatory measures and practices, Decision of 16 July 2004* (19 July, 2004).

32 See GPA/79/Add.1, *Decision on modalities for the negotiations on extension of coverage and elimination of discriminatory measures and practices, Decision of 21 July 2005, Addendum* (22 July 2005).

and territories, public procurement for Japanese airports, etc.) closed just hours before the 8th WTO Ministerial Conference. Accordingly, on 15 December 2011, the 43 Parties to the GPA reached a deal to improve its disciplines and expand market access. The final agreement was adopted by the Committee on Government Procurement on 30 March 2012.[33]

The revised GPA framework aims to create a more manageable and dynamic agreement. In this respect, it clarifies the S&D treatment for developing countries as well as simplifying the procedures for amending the lists of commitment contained in Appendix I. The new agreement also reinforces its pro-competitive and anti-discriminatory provisions and reinforces its mandatory rules regarding transparency in procurement policies and practices. At the same time, its provisions reduce time frames for government procurement of goods and services already available on the market, and establish specific procedures so that potential foreign suppliers can more easily challenge and be compensated for decisions awarding procurement contracts contrary to the GPA. However, the most significant advances have been in its improved scope of application (so-called GPA coverage), including procurement by provincial or departmental authorities as well as procurement of services under the new rules; particularly, regarding infrastructure construction projects.

The revised GPA increases its coverage tenfold with respect to the volume of procurement regulated by the Tokyo Round Code on Government Procurement. The increased volume of trade has resulted from incorporating new entities and sectors in the annexes to Appendix I as well as reducing threshold values. In short, Parties to the GPA have added over 200 bodies to their lists as well as procurement of services. The GPA coverage has been significantly extended in sectors such as construction, infrastructure, telecommunications, public transport, hospital equipment services and other public authority services. Thus, for example, the European Union and the United States have extended access to tenders from central bodies such as the European Commission and various US federal agencies. In addition, Japan has offered access to public-private partnerships (PPP) and large scale infrastructure construction projects. At the same time, for example, Canada has opened up its provincial procurement markets, and Korea its public railway and urban transport tenders. Finally, several GPA Parties provide coverage for new com-

33 See GPA/113 (2 April 2012).

plex 'contractual vehicles' like the macro-construction contracts known as build-operate-transfer agreements (BOTs).

Therefore, the revised GPA significantly increases access to procurement markets for foreign companies. As a result, the procurement covered by the new rules expands market access by an estimated USD 80-100 billion annually. [34] Consequently, the consolidation of a global procurement market is moving forward. It is thus a sector in which rule-based liberalization has successfully advanced within the context of an ongoing world economic crisis. In fact, the new instrument incorporates its own built-in agenda, which focuses on the following areas:

(1) sustainable public procurement,
(2) public procurement and SMEs,
(3) restrictions and exclusions within the Annexes of member state and
(4) Improvements in the compilation of statistical data.

The third of these points lays down a new negotiating mandate for increasing the coverage or scope of application. In this regard, the 2014 GPA built-in agenda formally brings to the negotiating table those sectors and entities currently restricted or excluded in the annexes of all 43 GPA Parties. Needless to say, the purpose of this item is to ensure the possibility of extending GPA coverage in the long term, with or without a successful Doha Round.[35] Thus, the built-in agenda allows this global procurement regime in the making to continue its forward march. In fact, Parties to the 1996 GPA formally agreed that the revised GPA provided the basis for negotiating accession to the former, even before the latter entered into force... This peculiar arrangement obviously involved some degree of juggling for those state representatives who were negotiating accession, as their discussions for accessing one treaty (the old GPA) were in the process of being replaced by another treaty (the new GPA!). As a result, as the revised GPA finally entered into force in 2014, countries in the process of negotiating accession to the former GPA were required to swap over to the new regulatory framework.

34 See GPA/121, *Report (2013),* op.cit.p.2.

35 See GPA/113 *Decision on results of the negotiations under Article XXIV:7 of the agreement on government procurement.*

Currently, negotiations for accession to the revised GPA continue to move forward. In fact, the US and the EU are redoubling their efforts to exert pressure on certain key states, with the People's Republic of China being prominent among these. The case of China's accession is particularly illustrative. For some observers, accession to the GPA of emerging economies such as China would be more positive for US and EU companies than other potential results awaiting an outcome in the stalled Doha Round. To paraphrase the Committee on Government Procurement, China's accession is 'a matter of tremendous significance for the agreement, for the WTO and for the world economy and an extremely important signal for emerging economies'.[36] As a result, the Committee hoped to conclude negotiations last year and thus intensified its negotiations regarding coverage and market access during 2014. In addition, the WTO Secretariat is particularly involved in providing technical assistance to Chinese representatives, in order to facilitate a prompt deal within the brand new GPA framework.

China's accession is an incentive to other emerging economies to make a move, in order to avoid being left out of the procurement markets to which Chinese companies will gain access. In fact, India has joined the GPA as an observer, to a great extent as a result of China's accession negotiations. The People's Republic of China has been a WTO Member since 2001, but began negotiations to join the GPA only seven years ago:[37] accession was formally requested on 28 December 2007 and the initial offer by China was circulated among the parties on 7 January 2008.[38] To date, China has already submitted several revised offers to the GPA Parties. In fact, on January 2014, GPA Parties received a fourth new revised bid, following a formal request by the USTR at the 2013 session of the US-China Joint Commission on Commerce and Trade.[39] However, the bids have failed to meet the expectations of key players such as the United States and the European Union. The requests for market access improvements from the US and the EU focus on gaining extended cov-

36 See GPA/121 (24 October, 2014), *Report (2013) of the Committee on Government Procurement*, paragraph 3.13.

37 See H. Wang, 'China's ten years in the WTO: review and perspectives', *Journal of Chinese economic and foreign trade studies* (2013): 53–69.

38 See GPA/ACC/CHN/1 (7 January 2008) and GPA/93 (14 January 2008).

39 For a comment on the bid circulated to GPA Parties (on a confidential basis) see *Inside U.S. Trade's China Trade Extra, New China GPA Offer Adds Six Provinces, But Still Falls Short Of Demands* (7 January 2014).

erage from central public bodies, regional authorities, and reducing threshold values, as well as its wide exclusions to certain procurement sectors and authorities.

4. A revised agreement in context

World procurement markets are currently dominated by industries from developed countries. As a result, developed countries are exerting strong pressure in WTO and other forums so that developing countries reduce the margins of discrimination against foreign companies in government procurement.[40] In this regard, companies lobby representatives from developed countries to obtain extra market access in E7 economies with a view, to name an illustrative example, to providing new transport and communications mega-infrastructures. However, developing countries have systematically opposed the launch of multilateral negotiations in this area since the Uruguay Round (1986-1994).[41] Thus, at the present time, there is no mandate for negotiating multilateral disciplines in this area.[42]

In this regard, the mandate of the Doha Round only covered the negotiations on the improvement of transparency in government procurement in response to the opposition to multilateral negotiations by developing countries. Accordingly, the WTO Ministerial Declaration of Singapore (13 December 1996) established a working group to analyze the transparency of procurement practices,[43] and envisaged the eventual negotiation of an agreement

40 See, for example, 2014 *National Trade Estimate Report on Foreign Trade Barriers*: *Annual report on trade barriers of the USTR* (United States Trade Representative 2014).

41 On the pre-Seattle proactive position of developing countries (with more than 200 proposals) see C. Michalopoulos, '*Developing Country Strategies for the Millennium Round*', 33 Journal of World Trade 5 (1999): 1–30. For long-term longitudal perspective on the position of developing countries previous to WTO see Scott, J., 'Developing Countries in the ITO and GATT Negotiations', 9 *Journal of International Trade Law and Policy* (2010): 5–24.

42 For a study on the gradual approach to non-discrimination in the field of multilateral public procurement see M. Dischendorfer, 'The existence and development of multilateral rules on government procurement under the framework of the WTO', 9 *Public Procurement Law Review* 1 (2000): 1–38.

43 See WTO WT/MIN(96)/DEC *Declaration of the WTO First Ministerial Conference,*

on transparency in the sector, which was in any case to be de-linked from GPA negotiations.[44] In Doha, the trade delegates from developing countries managed to ensure that the Final Declaration of 2001, inaugurating the new Development Round, expressly excluded the negotiation of undertakings on procurement market access:[45] '[the negotiations] shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers.'[46]

The Final Declaration opened up the possibility of new negotiations in this area following the fifth WTO Ministerial Conference (Cancun 2003), 'on the basis of a decision to be taken, by *explicit consensus*, at that session on *modalities of negotiations*'.[47] However, developing and developed countries were unable to attain the required *explicit consensus* in that Conference:[48] the Cancun failure to reach agreement on this issue arose from the increasing tensions in negotiations regarding the so-called Singapore issues; that is, as a result of the tensions caused by critical policy issues such as investment protection and antitrust in particular. In fact, the Singapore issues ended by being formally excluded from the Doha Round in 2004, as a way of mitigating policy frictions in the interests of a successful Round. In this way, the WTO Members approved the so-called 'July package' in which developed countries

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Singapore (18 December 1996) and S. Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement', 47 *International and Comparative Law Quarterly* (1997): 793–810 (studying the establishment of this group).

44 For the original idea of such multilateral agreement see *Non Paper*-Government Procurement (European Union 1996) and *Non Paper*-Further Ideas on a WTO Government Procurement Initiative (USTR 1996).

45 See WT/MIN(01)/DEC/1, Ministerial Declaration adopted 14 November 2001 (20 November 2001).

46 For a critical assessment of the functions and benefits of transparency in public procurement see S. Arrowsmith, 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization', 37 *Journal of World Trade* (2003): 283–303.

47 See WT/WGTGP/W/32, *Work of the working group on the matters related to items I-V of the list of the issues raised and points made*, *Secretariat Note* (23 May 2002), and WT/WGTGP/W/33, *Work of the working group on the matters related to items vi-xii of the list of the issues raised and points made, Secretariat Note* (3 October 2002).

48 For the 12 items examined by the transparency working group (potential areas for drafting a possible agreement) see the 'Chairman's Checklist'. See JOB(99)/6782, *List of issues raised and points made, President's Informal Note.*

agreed to remove these issues from the negotiation mandate, in order to keep the Round talks ongoing.[49] Nevertheless, developed countries have stepped up the pressure on certain developing countries to obtain undertakings to open up their government procurement markets through other regulatory vehicles within the WTO (i.e. GATS), as well as outside WTO (i.e. preferential trade agreements).

However, with regard to the former, developed countries are finding it increasingly difficult to use their traditional negotiating leverage for obtaining trade-offs within the WTO institutional structure. As a result, the feasibility of improving access to the procurement markets of developing countries through GATS is currently scarce at best, as its article XIII.1 expressly exempts government procurement from the main market access provisions of GATS.[50] In any case, GATS article XIII.2 establishes a negotiating mandate on services procurement. Thus, it is not easy to predict final outcomes in this area, as the success of multilateral trade negotiations always depends on complex trade-offs on which consensus may be reached, literally, at the last minute. In practice, as mentioned, MTN Rounds (Multilateral Trade Negotiations) encourage a precarious balance of concessions between a wide variety of requests offered in numerous negotiating sectors (i.e. industrial tariffs, subsidies, agriculture, IP-health related issues, among others). Therefore, it is generally difficult to predict the developments and outcomes of the Round overall. In fact, many already argue that the Doha Round has already failed. The July package managed to overcome this impasse and reinvigorated the Round. To summarize, notwithstanding some progress in the GATS negotiations regarding procurement of services, the success of negotiations is also dependent on other parallel WTO negotiations. In this regard, whether or not there is a definitive deal will depend on 160 WTO Members valuing the overall results positively; which is a difficult but not impossible task to achieve, as previous GATT Rounds suggest.

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49 See Doc WT/579 *Decision adopted by the General Council on 1 August 2004* (2 August 2004).

50 On GATS liberalization and the eventual GPA multilateralization see S. Evenett & B. Hoekman, 'Government Procurement of Services: Assessing the Case for Multilateral Disciplines' *Services 2000: New Directions in Services Trade Liberalization* (Brookings Institution Press 2000) at 143–164.

At the present time, the WTO regime not only manages substantive and procedural rules -which become international hard law under a binding global jurisdiction- but also provides a stable and dynamic regulatory framework for opening up domestic markets through regular multi-state crossed-concessions and trade-offs. In this sense, WTO law constitutes a hyper-specialized legal system on its own terms and one that has been shown to be particularly dynamic to date. In fact, as explained, the WTO defines itself in its constitutive treaty as a Permanent Forum for Negotiations, and thus includes the regular launch of multilateral trade negotiations among its functions.[51] As progressive liberalization is inherent in the world trading system, the GATT regime has expanded its negotiating mandates over entire new areas. In this regard, the long-term efforts to build a global procurement market from an agreement of voluntary accession for WTO Members –a plurilateral agreement such as the GPA– are an expression of this culture. In this context, some developed GPA Parties tend to promote the opening up of government procurement markets through any regulatory vehicle available within the scope of WTO covered agreements. In fact, many north-south tensions within the Doha Round originate from such practices, as some developed WTO Members such as the US and the EU are particularly lax when interpreting the agreed negotiating mandate for each MTN Round; and procurement is not foreign to these practices.

The objective of governments pushing for this strategy –notably USA and EU– is to increase market access for the global companies incorporated in their territories. By regularly shifting forums, parallel negotiating venues are available for the 'opening up of government procurement markets'. Thus, trade representatives not only negotiate procurement within the GPA framework but in other WTO regulatory frameworks such as GATS, as well as outside WTO, such as the recent US and EU FTAs incorporating procurement provisions; [52] as a result, concessions that cannot be achieved within the

51 See Article III.2 of the WTO Agreement.

52 See, for example, S. Khorana & A. Asthana, 'EU FTA negotiations with India: the question of liberalisation of public procurement', 12 *Asia Europe Journal* 1 (2014): 1–13. For a recent OECD study (briefly covering 47 RTA with procurement provisions) see A. Ueno, 'Multilateralising regionalism on government procurement', *OECD Trade Policy Papers* 151 (10 May 2013). See also Doc S/WPGR/W/49 *Government Procurement related provisions in Economic Integration Agreements* –Note by Secretariat (31 August 2004) and Doc S/WPGR/W/49/Add.1 (8 September 2009), containing the two reports

world trading system will be requested in alternative forums.[53] Therefore, a variety of initiatives have been launched in diverse forums for promoting the opening up of procurement markets. This strategy not only transcends the GPA framework, but also the WTO itself:

- Liberalization within the GPA framework,
- Liberalization within the WTO framework, but outside the GPA (i.e. GATS),
- Liberalization outside the WTO (e.g. bilateral treaties).

In the world of regulatory networks, the WTO will continue to be the central regulatory regime for governing the global market economy in the making as long as it is able to regularly expand and upgrade its rules. For this reason, the eventual failure to achieve significant results in the Doha Round is generally perceived by trade practitioners and experts as a serious systemic risk for the world trading system. In the absence of substantial multilateral concessions within the Doha Round, the GPA framework analyzed in these pages will be increasingly perceived by some as a feasible alternative model for advancing new commitments in other sectors potentially covered by WTO law. Arguably, such strategies of variable geometry within WTO could perhaps mitigate fragmentation in economic governance, by at least allowing disputes to be resolved within the WTO dispute settlement system and thus within the four corners of well-established procedures, practices and case law. However, the path of preferentials is not free from perils.[54]

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from WTO Secretariat on this issue.

53 See K. Alter & S. Meunier, 'The International Politics of Regime Complexity', 7 *Perspectives on Politics* (2009): 13–24. For the case of industrial property, see, en particular, S. Sell, 'Cat and Mouse: Forum shifting in the battle over intellectual property rules and enforcement', *International Studies Association Montreal* (March 16-19th 2011).

54 J. Bhagwati, *Termites in the world trading system: How preferential agrements undermine free trade* (Oxford University Press 2008).

7

Legal commoditization of cultural expressions

1. Culture as consumption

World trade law and policy is a collective endeavor promoting the public good nature of markets. Its basic economic underpinnings generally consist of transforming the marketplace into a central social institution and for-profit organizations as its primary actors.[1] Within this paradigm, all things and activities are approached by trade policymakers through these policy lenses. This final chapter takes culture as a case of study for exploring some blind spots in this world vision. In doing so, these pages analyze the two main global competing perceptions of culture: that is to say, the position of culture within the world trading system on one hand and, on the other, the alternative legal stance taken in this regard by some ministries of culture within the United Nations Educational, Scientific and Cultural Organization (UNESCO).

In line with the market paradigm, trade agreements regulate the objects and activities that encapsulate cultural expressions as goods and services, respectively. In essence, this is the predominant perception of culture among public and private technocracies currently managing the big audiovisual industries of developed countries. Within the world trading system, progressive liberalization of trade in goods and services is promoted, irrespective of whether the objects and activities subject to global transaction have a cultural 'nature' or not.[2] As a result, global cultural transfers are approached from a purely commercial perspective in the trade policy mind. That is to say, for example, 'a book = a comb' (read object as product), or 'cinema = auditing' (read film screening as commercial service), etc.

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1 S. Picciotto, *Regulating global corporate capitalism* (Cambridge University Press 2011).

2 I. Bernier, 'Culture', *The World Trade Organization: Legal, Economic, and Political Analysis* (Springer 2005).

For the critics, obviously, the framing of culture as mere goods and services conflicts with the alternative perception of culture as a structural social value to be promoted and preserved:[3] that is, as a set of collective experiences that are a reflection of each society and which are continually elaborated on over time.[4] The question that often puzzles critics is framed in this way: is it reasonable to apply the same regulations to cinema, theatre, or television, for example, as those applied to trade in combs, or auto-parts and components (GATT)... or to auditing and consulting services (GATS)? Many think that it is not and thus, in contrast, argue in favor of special and differentiated policies regulating world exchange, in order to protect and promote diversity.

In this sense, the alternative world visions of culture are more subtle and complex. Understanding that the way our values and tastes develop is largely determined by social environment, and thus always includes exogenous components, critics denounce the overexposure to the audiovisual products and services of world cultural industries, which are often distributed with predatory business practices, and which also do not usually vary much in terms of cultural diversity. The critics also suggest that domestic policies focused on promoting the growth of 'national' cultural industries so that they can compete in the global marketplace only increase such bias worldscale, as cultural industries often tend to discriminate against social values such as (1) equality, (2) collectivism, (3) cooperativism, (4) anti-consumerism, among others, in favor of other types of values.

In short, for the critics, by regulating the world as a mere 'marketplace', and culture as mere 'products' or 'services', basic components of our collective imagination are placed under industry/corporate control.[5] By extension, as overexposure to industrial cultural products and services has a bearing not only on citizens' decision-making but on identity formation across the lifes-

3 Regarding the term "culture", a wide range of definitions have been compiled by Alfred Kroeber and Clyde Kluckhohn in the nineteen fifties. A. Kroeber & C. Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Peabody Museum of Archaeology & Ethnology 1952).

4 On the way in which images of popular culture circulate and the ways in which they are internalised and how they adapt life styles, see A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press 1996).

5 P. Grant & Ch. Wood, *Blockbusters and Trade Wars: Popular culture in a Globalized World* (Douglas & McIntyre 2004)

pan as well, political ecosystems are also seen to be affected in the long-term policy cycle.[6] This last critical stance from a cultural policy perspective was clearly framed or encapsulated by Gramsci, who half a century ago explained how 'cultural hegemony' also produces manufacture of consent and thus inevitably social control.[7] Thus, the protection and promotion of cultural diversity is often perceived to be a systemic issue for society.

2. Alternative legal ideas

The world trading system approaches culture as mere goods or services to be traded under GATT and GATS disciplines, respectively, as culture is also subsumed in the logic of comparative advantage, specialization and exchange. However, as mentioned, what is conceived as mere 'goods and services' by trade agencies and audiovisual industries, for example, for others is also deemed to be 'cultural expressions'. Inevitably, the question remains of whether it is sufficient to specialize in producing guns and butter and thus leave to others the production of films, digital games or documentaries. Independent producers and a number of culture ministers have taken the latter stance and, in consequence, propose alternative public policies to those focused on pure world-market formation and market access. In this regard, a significant number of ministers of culture representing their countries at UNESCO perceive culture as a 'set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'.[8] Thus, they see culture as more than just goods

6 A good society, as Stuart Mill would have said, requires complete freedom for human nature to expand in infinite and opposing directions. See J. Stuart Mill, *On Liberty and Autobiography,* VII (London 1873) at 239.

7 For the initial reflections on the idea of 'cultural industry' (1947) see, M. Horkheimer & T. Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Sanford University Press 2002) and A. Mattelart & J. Piemme, 'Cultural Industries: The Origins of an Idea', *Cultural Industries: A Challenge for the Future* (UNESCO 1982) at 51 –61.

8 Definition of the Convention on Cultural Diversity and the UNESCO Universal Declaration on Cultural Diversity from the conclusions of the World Conference on Cultural Policies (Mondiacult 1982), the World Culture and Development Commission (Our Creative Diversity 1995) and the Intergovernmental Conference on Cultural Policies for Development (Stockholm 1998).

and services and, by extension, somewhat more than the object or activity in which a cultural expression is encapsulated.

As a result, a group of culture representing their countries as UNESCO members not only question but also resist the purely commercial worldview of culture as mere goods and services currently promoted by trade agencies through international lawmaking. With this aim, the UNESCO Convention on Cultural Diversity was set up on 18 March 2007, strategically designed to act as a counterweight to the strictly commercial worldview of culture. Thus, the preamble of the convention offers an alternative reading of the meaning of culture in society: 'cultural activities goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value'. The convention considers 'cultural activities, goods and services relevant when they embody or convey cultural expressions, irrespective of the commercial value they may have' (article 4.4). In this regard, cultural expressions are defined as follows: 'those expressions that result from the creativity of individuals, groups and societies, and that have cultural content' (article 4.3). In accordance with this approach, culture acts as the cement that somehow helps bring people together. Therefore, world trade liberalization in cultural products and services is considered to be inefficient in social terms from a cultural policy perspective, as it facilitates domestic access to domestic markets –and thus also the global expansion– of dominant audiovisual industries which integrate world production and distribution through vertical business models based on IP, for example. From this perspective, trade liberalization intensifies the long ongoing asymmetries in the *balance of cultural transfers* between societies, and has an adverse effect on sustainable local cultures. Therefore, advocates of cultural diversity are seeking to adapt the state of play in order to rebalance cultural exchange.[9]

Finally, imbalances in cultural transfers are not uniquely relevant for policies on cultural diversity as those have a direct and measurable bearing on bilateral trade balances. In this regard, countries can improve their bilateral trade balances by means of favorable balances on cultural transfers with other

9 For the challenges faced by cultural diversity due to these asymmetric cultural flows see *Report on Human Development 2004: Cultural liberty in today's diverse world* (PNUD 2004).

countries: in this regard, for example, mass consumption of US products and services was fuelled by the internationalization of cinema, television and pop music beginning in the first half of the 20th century; Will Hays, the head of the Motion Pictures Association of America (MPAA) at that time, coined the popular expression 'trade follows the film' for this very reason.[10] In this respect, it is no coincidence that US leadership in the international post-war order was partly consolidated through the globalization of US-originated mass culture.[11] Ultimately, power is exercised in the most effective and lasting way through persuasion and soft power.[12] The influence on the social, political and economic preferences of others through culture, as in cultural transfer, is always more efficient than coercion.[13]Also for that reason, any advanced foreign policy grants a pivotal role to so-called cultural diplomacy today.[14] As part of this general policy approach, countries with large export-oriented cultural industries within their territories, such as the United States, tend to intensely and often fiercely promote trade liberalization on audiovisual products and services.

3. Treaty-based resistance

In contrast to the purely commercial worldview of culture, cultural diversity seeks –among other policy measures– to promote some degree of reciprocity in the global balance of cultural transfers. In this respect, the Universal Declaration on Cultural Diversity, approved post September 11 by UNESCO (2001), the Convention for the Safeguarding of the Intangible Cultural Heritage of

10 See G. Bakker, *Trade Follows the Film: Europe versus Hollywood in the Interwar Years,* Cultural Industries in Britain and Germany: Sport, Music and Entertainment From the Eighteenth to the Twentieth Century (Wissner Verlag 2012) at 139–155.

11 R. Vasey, *The World According to Hollywood, 1918–1939* (University of Wisconsin Press 1997) at 42.

12 J. Nye, *Soft power: The means to success in world politics* (Public Affairs Press 2004).

13 A. Dorfman & A. Mattelart, *How to Read Donald Duck: Imperialism ideology in the Disney Comic* (International General 1984).

14 See *Cultural Diplomacy: The Lynchpin of Public Diplomacy* (State Department, 2005), R. Arndt, *The First Resort of Kings: American Cultural Diplomacy in the Twentieth Century* (Brassey's Inc 2005) and F. Stonor Saunders, *The Cultural Cold War: The C.I.A. and the World of Arts and Letters* (The New Press 2000).

Humanity (2003) and the Convention on Cultural Diversity (2005) are exponents of a non-strictly commercial perception of culture. The Declaration raises cultural diversity to the category of common heritage of humanity and connects with the dignity of the individual. Similarly, it supports intercultural dialogue and assumes that one should recognize others (otherness) as well as the inevitable condition of one's own 'plural' identity.[15] This set of soft-law rules paved the way for the Convention on Cultural Diversity to later legalize an alternative conception and approach to culture.

The convention preamble clearly expresses the alternative worldview: 'cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures'. For this reason, one of the goals is 'to encourage dialogue among cultures with a view to ensuring wider and more balanced cultural exchanges in the world' (article 1.c). The idea of intercultural dialogue aims to achieve *cross-fertilization* between societies communicating their own and other values. In short, it aims to enable non-hegemonic societies to relate on an equal footing –intercultural communication and dialogue– with current hegemonic cultures (i.e. western culture). Furthermore, the Convention also confirms the *principle of equitable access:* '[the] equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding' (article 2.7). Similarly, it defines 'interculturality' as 'the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect' (article 4.8).

Underlying this treaty framework is a policy position that considers that promoting dialogue between societies is more socially efficient in aggregated terms than merely promoting market access for the global cultural industries. This legal framework was alternatively devised for preserving independent creators as well as small and medium enterprises producing and distributing culture across nations. In this respect, the Convention provides new tools. Articles 2.2 and 5 of the Convention regulate the sover-

15 For a selection of the relevant provisions of multiple international instruments see I. Bernier, *Catalogue of International Principles Pertaining to Culture* (International Network on Cultural Policy 2000).

eign right of states to apply policy measures to protect cultural diversity: 'states have, in accordance with the Charter of the United Nations and the principles of international law, *the sovereign right* to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory'. In turn, its Intergovernmental Committee has the power to prepare and submit *operational guidelines to the Conference of Parties* in this regard (article 23.6.b).

Both in theory and practice, the UNESCO Convention was strategically designed to provide a legal counterweight to trade liberalization within WTO and PTAs; in short, to counteract the legal treatment of culture within these regimes as a mere product or service.[16] Paradoxically, an instrument of international law created by the ministers of culture –read the convention– attempts to rebalance the leverage of other instruments of international law created by trade ministers –namely WTO law as well as PTAs–. In this regard, it could be argued that, within the current fragmentation of global governance, treaty-based regimes are sometimes transformed into a higher level-playing field for world policy battles, including inter-ministerial battles (i.e. cultural vs. trade agencies).

In fact, regulating the international legal position of the UNESCO Convention with regard to WTO law itself was one of the main issues during the negotiations and, obviously, posed a direct challenge by ministers of culture to those running the trade portfolio.[17] Finally, article 20 regulating this issue –entitled 'relationship to other treaties'– was worded with calculated ambiguity as a result of policy pressures; the reason for this is the disagreements between the majority group led by European ministers of culture on one hand –who advocated a special treatment for cultural goods and services–, and , on the other, the United States, Australia and Japan, who publicly framed the whole initiative of the Convention as an undercover protectionist initiative. The suggestive subtitle of the provision is 'Mutual support-

16 C. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?' 9 *Journal of International Economic Law* (2006): 553.

17 The European Commission actually claimed (in a communication to the European and Council and Parliament) that the new instrument has no effect on the rules of the multilateral trade system: 'such instrument would not affect and be without prejudice to'. See *Towards an international instrument on cultural diversity*, Commission of the European Communities, COM(2003) 520final.

iveness, complementarity and non-subordination', and section 1 reads as follows: 'Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties'. Accordingly, 'without subordinating this Convention to any other treaty', the Parties (a) 'shall foster *mutual supportiveness* between this Convention and the other treaties to which they are parties' and (b) 'shall take into account' the relevant provisions of the Convention 'when interpreting and applying the other treaties to which they are parties or when entering into other international obligations'.

However, blowing hot and cold as it were, section 2 then also contains the following provision: 'Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties'. Therefore, the clause leaves the question of the legal relations between the UNESCO Convention and WTO law at a complete stalemate. In practical terms, however, this result is a triumph for the advocates of a commercial worldview of culture, as the Convention only relies on a mechanism of good offices, mediation or conciliation for settling disputes in article 25, and lacks effective enforcement procedures to ensure compliance with its rules. In short, the rules which carry weight in practice within domestic inter-ministerial politics when it comes to solving the tensions of the 'trade and culture' puzzle are those of the world trading system, as this regime relies on a binding jurisdiction, compulsory for all WTO members, which also ensures compliance with WTO law by authorizing suspension of trade concessions and obligations.[18]

Notwithstanding this situation, the Convention can be useful for obtaining some measure of deference to cultural diversity within both WTO adjudication and MTNs: on one hand, interpreting treaties in compliance with general international law technically requires 'taking into account' *any international law applicable in the relations between the parties* (article 31.3.c of the Vienna convention on the law of the treaties).[19] On the other hand, the mere existence of the UNESCO Convention substantially improves the negotiating position of its parties as WTO Members within WTO negotiating rounds. That is

18 See J. Jackson, 'The role and effectiveness of the WTO Dispute Settlement Mechanism', *Brookings Trade Forum* (2000) at 179–219 and P. Mavroidis & A. Sykes (eds), *The WTO and international trade law/dispute settlement* (Edward Elgar 2005).

19 P. Zapatero, 'Modern international law', op.cit.

to say, the Convention helps resist the pressures for progressive liberalization within WTO.[20] To quote Voon:

'The UNESCO Convention may well cause those WTO Members who seek greater leeway for their cultural policy measures to dig in their heels and refuse to increase their commitments in relation to cultural products under GATS'.[21]

That is the real power of the convention and the main reason why the US delegation qualified it as 'deeply flawed', warning that it could potentially 'impair rights and obligations under other international agreements and adversely impact prospects for successful completion of the Doha Development Round negotiations'.[22] In short, the UNESCO Convention gives its parties a degree of negotiating leverage within the WTO regime. Aside from reducing the level of pressure for progressive liberalization in this sector, however, no major global transformations are expected as a result of the convention.[23] At the same time, it should be recalled that the convention has obviously not been ratified by the United States.[24]

Given this state of affairs, the conference of the parties (COP) and the intergovernmental committee of the Convention have two basic alternatives to address the approach to culture embedded into WTO: *integration* (read cooperation) or *confrontation* (read conflict). If the parties to the Convention were to accept greater cooperation, perhaps some friendly but minor concessions to cultural diversity could be obtained within WTO decision-making procedures in the midterm. Arguably, this would also imply a measure of adherence to the legal worldview of culture promoted in WTO.

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20 K. Acheson & Ch. Maule, 'Convention on Cultural Diversity', 28 *Journal of Cultural Economics* 4: 251.

21 T. Voon, *Cultural products and the World Trade Organization* (Cambridge University Press 2007) at 253.

22 See Robert Martin, *Final Statement of the United States Delegation: Third Session of the Intergovernmental Meeting of Experts*, UNESCO (3 June 2005).

23 J. Pauwelyn, 'The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law-Making', *ASIL Insights* (November 2005).

24 C. Balassa, 'The Impact of the U. S. Position in the Trade and Culture Debate: Negotiation of the Convention on the Diversity of Cultural Expressions', *The UNESCO Convention on the Diversity of Cultural Expressions : a Tale of Fragmentation in International Law* (Intersentia 2012) at 71–95.

Be that as it may, if cooperation is sought, this would require greater inter-institutional communication, and thus joint decision-making in some matters of shared competence. Within the UNESCO Convention, the task could be granted to the intergovernmental committee, which is probably the body best qualified to make proposals on this point. Until now however, UNESCO and the WTO have developed their own activities in clinical isolation from each other. In fact, the ministers of culture negotiating the convention did not agree to cooperate with other treaty-based regimes but to ensure that those regimes operate in compliance with the objectives and principles of the convention! Thus, article 21 under the heading 'International Consultations and Coordination' reads as follows:

'The Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.'

Similarly, article 23.6 authorizes the intergovernmental committee 'to establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this convention in *other international forums*'. In short, the UNESCO Convention does not so much seek to extend a bridge to the world trading system as to demand from WTO rules and acts that they will ensure the non hindrance of the policies and domestic measures promoted by its treaty provisions. At present, 133 signatory states have adhered to or ratified this international legal instrument.

4. Competing world visions

Evidently, bridging these world visions, legalized through separate and distinct but equally valid treaties, is not an easy task. Freedom of choice is not automatically synonymous with the market, just as democracy is not equivalent to the marketplace. Similarly, access to culture and consumption of culture are not equivalent, as consumption may be a form of access, but access in itself is more than the activity of consumption. There are some qualitative differences. Nonetheless, developing a sustainable legal balance between open markets and cultural diversity probably requires world policies to strengthen the position of the two basic extremes of any cultural experience; namely, creators and users: that is, adopting world policy measures of positive dis-

crimination towards the micro –independent SME, micro-entrepreneurs and individual creators and users– instead of macro –large-scale cultural industries– in critical policy areas.[25]

Cultural diversity policies have been devised to nurture the richness of social life, by opening all windows, as well as keeping them open. These policies enable us, as community or individuals, to better situate ourselves in the world, by having access –and thus being exposed– to the kaleidoscopic tapestry of cultural backgrounds, worldviews and expressions, built by the others, here and there. On the contrary, the cultural content produced and distributed for mass production by large industries cannot easily extend our comprehension of others –as they are simply not those others– and so naturally do not enrich our vital experiences.[26] As nonintegrated or alternative visions often do not pass through,[27] the transformative power of art (stories, dreams, images, ideas) is also diluted. [28] For these basic reasons, the UNESCO Convention defines cultural content in article 4.2 as 'the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.'

However, it is not only WTO regulatory approaches to cultural products and services that deserve reconsideration. Mainstream antitrust law and policy should also arguably be revisited, as the way in which antitrust law is interpreted and enforced in most jurisdictions nowadays tends to benefit large companies to the detriment of small and medium cultural enterprises; a bias inevitably translated to antitrust enforcement cooperation. Conventionally, competition law and policy in advanced economies is oriented to protect consumers, not competitors. As a result, competition law and policy has been progressively reoriented by the leading antitrust authorities in last decades

25 See *Reclaiming Cultural Diversity: Report on the conference 'Regulations in Favour of Cultural Diversity'*, De Balie, Amsterdam, Utrecht School of the Arts/Hivos (25-27 September 2003).

26 J. Smiers, *Arts under Pressure: Promoting cultural diversity in the age of globalization* (Zed Books 2003).

27 On the idea of how cultural industries eliminate autonomy of art see M. Horkheimer & T. Adorno, *Dialectic of Enlightenment*, op.cit. For a brief historical analysis see also H. Buchloch, 'Introduction', *Neo-Avantgarde and Culture Industry: Essays on European Art from 1955 to 1975* (MIT Press 2000).

28 See *Recommendation relating to the artist's condition approved in the plenary session 37a of UNESCO* (27 October 1980).

towards so-called 'consumer welfare maximization', which is essentially understood as lower prices, with some conditions added.[29] In addition, the number of competitors required for competition to technically take place in any market sector has almost become irrelevant, as the motto *protect competition, not competitors* has been transformed by antitrust authorities into regulatory axiom,[30] in which legality is nowadays basically decided by measuring so-called economic efficiencies.

This policy approach impacts world market structures, and thus world production and distribution of goods and services by giving legal preference to large-scale business activity generally, and thus also in relation to the cultural sector. As cultural diversity does not have any legal meaning under this policy approach which is diffused around the globe in a variety of regulatory forms, antitrust authorities have not adopted any significant enforcement action in the benefit of small and medium producers and distributors of culture vis-à-vis the practices of larger competitors. In short, the very legal idea of cultural diversity in both society and market –as it stands in international instruments– is still at odds with domestic and global antitrust policies.[31]

In this context, the policy strategies of some culture ministers and proactive critics may perhaps help rebalance the position of diversity within these regulatory structures in the long term. The convention on cultural diversity partly owes its existence to the international network on cultural policy (INCP), originally devised by ministers of culture to counteract services liberalization in the cultural sector within the first round of post-WTO negotiations. This global inter-ministerial network was, in turn, supported and advised by the international network for cultural diversity (INCD),[32] a strong civil society

29 For a comment see J. Brodley, 'Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress', 62 *New York University Law Review* (1987): 1035–1036.

30 See *Brown Shoe Co v United States*, 370 US 294, 320 (1962).

31 See in particular E. Fox. '*We Protect Competition, You Protect Competitors*', 26 *World Competition* 149 (2003): 149–165.

32 The Canadian cultural community was a central influence in the process. For the initial proposals see *New Strategies for Culture and Trade: Canadian Culture in the Global World*, SAGIT/Cultural industries Sectoral Advisory Group on International Trade (February 1999). See also, I. Bernier & H. Ruiz Fabri, *Evaluation of the Legal Feasibility of an International Instrument Governing Cultural Diversity* (Quebec 2002).

coalition sufficiently well organized to end up presenting its own 'Proposed convention on cultural diversity' to UNESCO.[33] For example, the pressures of the leaders and representatives of European culture during the GATS 2000 negotiations led the EU DG Trade not to accept service liberalization requests in the cultural sector within the GATS negotiating framework, and not to make any liberalization offer within such negotiations.[34]

In fact, the so-called European cultural exception consisted precisely of this, some years before, during the Uruguay Round –ie. not making services liberalization offers in the audiovisual sector–,[35] whereas the United States refused to recognize the special cultural nature – read cultural exception– of audiovisual services.[36] To paraphrase Voon, the GATT contracting parties agreed to disagree on this.[37] From then on, the European Union has failed to listen to the continuous demands and requests of the United States to improve access of their industries to the European audiovisual market (cinema and television restrictions).[38] However, this defensive strategy inside the WTO cannot easily be played by less powerful WTO Members. Thus, evidently, this attitude leaves multiple developing countries alone in protecting their cultural diversity against the intense pressures of an USTR aiming to improve market access for audiovisual products and services.

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33 See *Proposed Convention on Cultural Diversity* (15 January 2003).

34 For the revised text of the European offer see TN/S/O/EEC/Rev.1, *Communication from the European Communities and its Member States, Conditional Revised Offer* (29 June 2005).

35 On the concept of cultural exception and its implication in domestic and global public policies see J. Farchy, *La fin de l'exception culturelle?* (CNRS 1999) and B. Gournay, *Exception culturelle et mondialisation* (Presse de Science 2002).

36 See J. Croome, *Reshaping the world trading system: a history*, op.cit.p.328, as well as the WTO, Council for Trade in Services, Audiovisual Services: Background Note by the Secretariat, S/C/W/40 (15 June 1998).

37 See T. Voon, *Cultural products and the World Trade Organization* (Cambridge University Press 2008) at 5 and 249.

38 See Doc WT/MIN(01)/DEC/W/1(2001), *Ministerial Declaration of Doha* (14 November 2001). For an explanation of the point of departure and context of negotiations see P. Messerlin, S. Siwek & E. Cocq, *The Audiovisual Services Sector in the GATS Negotiations* (American Enterprise Institute Press 2004) and Ch. Graber, 'Audiovisual Media and the Law of the WTO', *Free Trade versus Cultural Diversity* (Schulthess 2004) at 15–65.

8

Future world polity and markets

Eunomia is the word for the old Greek practice of imagining good societies. Markets and states are powerful social inventions and continue to be among the most useful means of organizing human gatherings. A proper balance between open markets and social states can arguably deliver optimum models for organizing social life, or at least feasible second bests, until something better is invented. After all, through open markets we are able to produce best price and quality goods and services; through social states we are able to secure safety nets for all, and a measure of fairness. The world trading system analyzed in these pages has to be framed in the context of this background, as a critical architecture of global governance providing an effective legal framework for the management of open markets. Notwithstanding its inner flaws and contradictions, some of which are mentioned in this book, its legal infrastructures have made a long-lasting contribution to prosperity, reducing poverty and raising standards of living, unmatched by any previous moment in human experience. Last but not least, the world trading system is also one of the best designed treaty-based regimes in history as well as from the perspective of comparative international law; thereby also signaling a capacity for managing open markets for the better which has not yet been sufficiently chartered.

However, it would be reasonable to argue that the restrictive rationalities of both its insider network and rulebook should be more properly balanced. To paraphrase Picciotto, there are wide-ranging policy debates about both the effectiveness and legitimacy of the emerging system of global governance;[1] and that certainly fully applies to the WTO regime. Trade equals market, and markets require states and thus a wide variety of public policies. However, the rulebook regulating open markets is delinked from some things (e.g. sustainability, antitrust, etc) while paradoxically linked to others (i.e. propertization

1 S. Picciotto, *Regulating corporate*, op.cit.p.79.

of intangibles). The regulatory spectrum of the WTO notably advanced along these lines, giving more voice to business than to parliaments and non-trade agencies. In principle, rebalancing global governance within open markets requires the construction of higher mediating institutions –mediating open markets with other policy values– as well as bridges which effectively connect international regimes in order to operate jointly within an improved overarching legal framework. Probably, the policy avenue of so-called international regimes, so dear to functionalism –in the sense of decomposable hierarchies governing specific issue areas and designed to keep out the public, as well as officials from other branches in order to apprehend and manage social life–[2] would do well to be reengineered.

The world trading system is entrenched within the natural sets of relationships between market and society. In longitudinal terms, the best account of the enduring and frequently fraught struggle between market and society were masterly portrayed by Polanyi time ago.[3] Building on that seminal explanation, Ruggie encapsulated the paradigm of so-called embedded liberalism, as a positive and influential narrative depicting how the capitalist countries ventured to reconcile the efficiency of markets with the social state, at a moment in history in which there was a wider policy consensus which considered the social state needed for open markets to exist and function properly:[4] the world trading system –as it stood prior to the Uruguay Round– was the distilled policy expression of this grand bargain –embedded liberalism– for peaceful post-war global governance. However, while world liberalization steadily advanced to historical levels of deep economic interdependence, key developments in global governance have taken place; some of them having a strong bearing on world policy direction, notable among these being the fall of the Berlin Wall as well as several major economic crises together with the rise of the ideology of market fundamentalism. Naturally, in recent years, international economic law and policy have taken a rather different approach to that of the embedded liberalism originally devised in the post-war global

2 See R. Keohane & J. Nye, 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy', *Efficiency, equity and legitimacy: the multilateral trading system at the Millenium* (Brookin Institution Press 2001) at 264.

3 K. Polanyi,*The Great Transformation,* op.cit.

4 J. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', 36 *International Organization* (1982): 379–415.

order. What Ruggie says today when revisiting that notion is, literally, that a fundamental recalibration of the public-private sector balance is taking place, both domestically and on a world-scale.[5]

But, what is that recalibration about? Robert Howse is one of the observers who has most clearly captured such recalibration.[6] As he explains, through embedded liberalism, trade liberalization was entrenched within a *political* commitment to the progressive, interventionist welfare state, a view broadly shared by the major players in the world trading system of that era. The trust that emerged from this shared vision produced acceptance of the differences in approach to the mixed economy and welfare state. In short, under the embedded liberalism bargain, differences in approach to the mixed economy were to be managed and thus generally accepted. In Howse´s own words, there was a notion that gains for the winners should allow to fully compensate the losers from removal of trade restrictions, while still netting an aggregate welfare gain; in principle, and according to this conception –based on Kaldor-Hicks efficiency–, no one needed be worse off in the end: the existence of a regulatory welfare state to take care of the interests of the losers through the use of non-trade policy tools –that are less costly to domestic welfare than trade restrictions– was assumed by all actors involved in that grand policy bargain.

However, following the economic crisis of the mid-1970s, it became commonplace to assume that world trade liberalization needed some fine-tuning in order to maintain the grand bargain; under these economic pressures, industrial policies began to be seen as undercover beggar-my-neighbor solutions for declining industrial sectors: as Howse frames it, a protectionist cheating on the open trade bargain; and then came the economic conservative revolution, together with the collapse of the Soviet Union, which provided for market-based perspectives generally, a strong critique of statist economic management, and thus offering a radically different outlook and prescription for the world.

Needless to say, the dominance of so-called market fundamentalism in the

5 J. Ruggie, 'Taking Embedded Liberalism Global: the corporate connection', *Taming Globalization: Frontiers of Governance* (Polity Press 2003) at 93–130.

6 R.Howse, "From Politics to Technocracy, op.cit.pp.98–99.

1980s, conventionally labeled the Washington consensus, was wrapped up in economistic triumphalist chants and translated to international organizations, including the GATT, by close knit cadres of technocrats and experts. In this context, the grand bargain of trade liberalization was no longer framed in terms of relative adequacy of the scope for trade adjustment. Both inside and outside the GATT, domestic adjustment policies were portrayed in rather a different light: in essence, domestic adjustment policies were considered not only as legally but morally questionable interventionist measures, politically conceived as structurally biased in the benefit of local rent-seeking constituencies.

The new paradigm in the making was to be expanded through most regulatory networks of global governance across which the GATT already performed a nodal function. In this context, the new policy narrative for rewriting the rules of the game for trade during the decade of the 80s shifted the perspective to consider a greater variety of old domestic policies as interventionist / protectionist trade barriers. The new motto for this policy quest was distilled in the term 'market access': societies are equated with markets, and foreign (read global) companies are to have a right to access or enter those markets –society as market–, if necessary even reforming law and policies less obviously related to trade, or even totally unrelated. Within this narrative, multiple legal and policy measures could be expediently reframed as a barrier to market access; which is what essentially has happened over the last three decades.

This transformative agenda got on board the Uruguay Round and, playing along with the historical context, became an essential part of its core: thus resulting in the expanded disciplines contained within WTO annexes, which we now indefatigably visit, revisit and dissect in order to venture whether this or that policy measures are legal or illegal in the new world of post-Uruguay Round public policies. Obviously, the logic of the trade-offs involved within this multi-state bargain has successfully enhanced market access worldwide. However, that package deal now entrenched worldwide is also no longer able to sustain the old embedded liberalism bargain, as the new WTO rulebook has more ambiguous if not weaker welfare effects (i.e. TRIPS) in contrast to the traditional GATT disciplines, namely those reducing tariffs, quotas, and discriminatory domestic regulation. As a result, not only has the policy dis-

tance between developed and developing countries increased but also that between both critics and advocates of open markets. In consequence, the policy space and momentumneeded to re-embed any meaningful global new deal is currently lacking.

In an interdependent world, moreover, conventional understandings of markets and states still require some fine tuning. As Picciotto sharply observes, despite the complex nature of the transformations of both the political and the economic spheres, and of the interactions between states and markets, mainstream accounts since the 1970s have remained confined within simple concepts of the state and the market, and have been particularly biased towards focusing on the failures and limits of states; as he explains, the notion of state action as being generally in the public interest has been deeply undermined, from both left and right; conversely, however, the concept of the market is used much less critically, by theorists of both persuasions. However, and paraphrasing Picciotto, the critics against market fundamentalism offer little basis for understanding the growth of regulation and of networks of global cooperation and coordination that have in fact accompanied the long road of international liberalization, and which play a major role in shaping global change. Last but not least, many of these critics are still indulging in senseless and exhausting shadow-boxing against a non-existent deregulation.[7]

In short, and as Braithwaite also frames it, those who believe we are in an era of neoliberalism –meaning a hollowing out of the state, privatization and deregulation– are mistaken, we are in a rather more complex and hybrid stage, which fairly recently and somewhat tentatively has been coined as regulatory capitalism.[8] Leaving aside whether regulatory capitalism properly describes the core changes taking place at the present time, it would be fair to consider it a potentially workable term for approaching the global transformations taking place with regard to markets and states. For David Levi-Faur, for example, regulation is both a constitutive element of capitalism –as the framework that enables markets– and the tool that moderates and socializes

7 S. Picciotto, *Regulating global corporate*, op.cit.p.76.

8 See D. Levi-Faur, 'The Global Diffusion of Regulatory Capitalism', 598 *The Annals of the American Academy* (March 2005): 12–34, D.Levi-Faur (ed.), 'Varieties of regulatory capitalism', 16 *Governance* (2006): 363–366 and J. Braithwaite, *Regulatory capitalism: How it works, ideas for making it work better* (Edward Elgard 2008).

it.[9] Whether or not the backbone of this transformation is capitalism or regulation, it is certainly evident that there is a global symbiosis between the two which deserves greater attention, particularly from elected policymakers. In a world characterized by open markets and increasingly complex regulatory networks, state and markets are not fully separated and distinct entities. As Joel Paul explains, the premise that the market and the state are autonomous, rational and homogenous actors is plainly erroneous:

'The state's interference in the market and the market's engagement in the state call into question the false premise of the market's autonomy. More to the point, they cast doubt on our understanding about the relationship of the state and the market and its consequences for economic integration'.[10]

In this context, following Underhill's insight, the relations between states and markets are probably best understood as a condominium: an explanatory model suggesting that states and markets are part of 'the same integrated ensemble of governance'.[11] In this radically different scenario –a state-market world condominium–, it is easy to argue with Picciotto that the policy debates about both the effectiveness and legitimacy of the emerging systems of global governance, unfortunately, have too often been conducted in the simplistic terms of a state-market dyad, and only slowly have they begun to come to terms with these more complex realities of the twenty-first century.[12]

A longitudinal big picture for these changes is offered by Braithwaite in a snapshot: as the Australian scholar puts it, the very long-term transitions since feudal structures fell to incipient capitalist institutions moved from a police economy, to an unregulable 19th century liberal economy to the provider state economy of recent decades and, now, to regulatory capitalism: as part of this profound historical transformation, markets have tended to progressively become more vigorous in fits and starts, across all of these transitions, as has the regulation of their externalities; and in this case, not only have

9 See D. Levi-Faur, 'The Global Diffusion, op.cit.pp. 12–32.

10 J. Paul, 'Free Trade, Regulatory Competition and the Autonomous Market Fallacy', 1 *Columbia Journal of European Law* (1995): 62.

11 G. Underhill, 'States, markets and governance for emerging market economies: Private interests, the public good and the legitimacy of the development process', 79 *International Affairs* (2003): 765.

12 S. Picciotto, *Regulating corporate,* op.cit.

markets, states, and state regulation become more formidable, but also non-state regulation by a wide variety of actors, thus opening the floor to a new world of private–public hybridity.[13]

Be that as it may, the litmus test for both the efficiency and legitimacy of the evolving system of global governance is probably dependent on a mixture of thriving markets and social rights. Pascal Lamy clearly described the challenge by imagining a so-called 'Geneva consensus'. In one of his last public speeches as Director General of the WTO, this practitioner of globalization recalled what some people think: that the successful opening of markets requires solid social policies to redistribute wealth or provide safeguards to the people whose living conditions are disrupted by global economic interdependence;[14] in his words, it is not only the legitimacy of global governance but the very credibility of modern democracies that is at risk if an increasing number of citizens perceive that the architectures of global governance managed by their representatives simply promote economic interdependence while not handling subsequent imbalances impacting daily life.[15]

The challenge, however, is not only that of the eventual feasibility of developing this imagined consensus; reasonably, the development of consensus, if any, probably has little chance of being pursued in the vicinity of the Place des Nations, in Geneva, particularly once the so-called Washington consensus has finally gone for good: the United States and the European Union may have lost that historical opportunity, in part by legitimizing and artificially sustaining such a simplistic and restrictive 'consensus' for three decades already, and thus promoting a fixed set of ill-conceived recipes around the world. As Virgilio Zapatero has explained, consensus is a way of taking decisions and doing things based on dialogue and transaction.[16]

In consequence, whether it is possible to develop a new consensus now also from the East –and thus from Beijing– is only a question that time will tell. In

13 J. Braithwaite, *Regulatory capitalism*, op.cit.pp. 26 –27.

14 P. Lamy, 'Lamy calls for mindset change to align trade and human rights', *WTO | Speeches and statements* (13 January 2010).

15 P. Lamy, 'Lamy calls for strenghening system of global governance', *WTO | Speeches and statements* (15 March 2010).

16 V. Zapatero, *El arte de legislar* (Tecnos 2009).

any event, in the current absence of a strong world polity and demos, the question to consider seriously is not only the role that elected representatives from parliamentary democracies would play in developing consensus for the world. In addition, it is no accident that corporations already have a bearing on global rulemaking generally. As the way the world evolves is connected to who imagines its forms and functions, these challenges need to be seriously considered in our social equations. In any case, a system of global governance managed by public and private technocracies is not the most promising of all worlds.

Policy is not spontaneously self-generated; it is defined by people. The transition from government to governance, as Picciotto has explained, implies a lack of a clear hierarchy of norms, a blurring of distinctions between hard and soft law, and a fragmentation of public functions entailing a resurgence of technocracy.[17] In this context, world market and state global elites are strong drivers currently shaping our world; a hybrid global technocracy not incidentally operating under pervasive public-private regulatory partnerships. By performing their evolving tasks and activities within expert rule-based systems such as WTO, these globalized technocracies define and redefine the state of play. The present day regulatory networks in which they manage global governance and are empowered are clearly not without flaws and contradictions; not to mention dubious lobbying, as global corporate capitalism suggests across the blurred frontiers between general and special interest. Thus, it is not always easy to see on whose behalf the technocrat is speaking in some global policy omissions and decisions. Furthermore, their performance is not only increasingly difficult to supervise but also to track by publicly elected representatives and civil society alike, as the depth and breadth of regulatory networks within global governance has grown enormously within the quest for economic interdependence.

Only by building a stronger world polity and demos will open markets be sustainable. World policy coherence requires rebalancing open markets with increased social cohesion and participation. Evidently, the regulatory networks managing world exchange today cannot promote any meaningful measure of policy coherence, never mind Eunomia. In this context, the system of global governance can be reengineered, but this inevitably requires investing in

17 S. Picciotto, 'International Transformations of the Capitalist State', 43 *Antipode* 1 (2011): 87–107

world regime-building as well as rejuvenating the grand bargain of embedded liberalism to deliver world social cohesion. This can only be done by exacting extra revenue from international free movement of goods, services and capital. In principle, this rebalance should not be impossible to deliver for the elected representatives currently in charge; after all, society is a continuous rebalancing experiment.

9

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